NO. 82-6466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUIS RUIZ, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1.

Does the Eighth Amendment permit the execution of a defendant in the absence of a finding that he took or intended to take life?

2.

Is the Eighth Amendment ban on unguided discretion in capital cases violated by a sentencing scheme that places no defined limits on factors that may be considered as reasons for imposing death?

3.

Does the standardless, post-charging discretion given to Illinois prosecutors to convene a death penalty hearing in murder cases violate the Eighth and Fourteenth Amendments?

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The petitioner, Luis Ruiz, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois holding that a sentence of death was properly imposed and that the Illinois death penalty statute does not violate the Eighth Amendment's proscription of cruel and unusual punishment.

OPINION BELOW

The opinion of the Supreme Court of Illinois was filed on December 17, 1982, as No. 53415. It has not yet been reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on December 17, 1982. A petition for rehearing was denied by order of the court on January 28, 1983, a memorandum of which order is attached hereto as Appendix B. This petition

is being filed within sixty days of the Illinois Supreme Court's denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

The offense of murder in Illinois is defined in Ill.Rev. Stat., 1977, Ch. 38, Sec. 9-1(a):

> A person who kills an individual without lawful justificiation commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

The provision for convening a capital sentencing hearing following an Illinois defendant's conviction for murder is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(d):

(d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c).

The statutory aggravating factor involved in this case is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b)3:

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts;

The provision for consideration of additional aggravating factors at the death sentencing proceeding is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(c) and 9-1(e):

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b)....

(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

IV.

STATEMENT OF THE CASE

Prior to trial Mr. Ruiz raised two of the federal questions involved in this petition by moving the trial court to declare the Illinois Death Penalty Statute unconstitutional. The motion alleged in part that the statute provided inadequate guidance for the sentencing body and afforded the prosecution standardless and unreviewable discretion to seek the death penalty. (Vol. I, R. 746, 751-771) The motion was summarily denied by the Circuit Court of Cook County on March 10, 1980. (Vol. I, R. 6) Following his conviction but prior to sentencing, Mr. Ruiz raised the third federal question involved in this petition by arguing that he could not be sentenced to death where his guilt was premised upon the theory of accountability. (Vol. II, R. 625-627) This argument was rejected by the trial court which held that petitioner was liable to the death penalty under Illinois law because he had been convicted of two or more murders. (R. 627-628) On appeal, the Illinois Supreme Court affirmed the sentence of death. The court distinguished Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), holding that although there was no evidence petitioner killed anyone, petitioner's "conduct was such as to support an inference that he possessed the intent to take the lives of the victims." People v. Ruiz, ___ Ill.2d at ___, No. 53415 (Dec. 17, 1982) (Appendix A, pg. 16)

The evidence at trial showed that on February 25, 1979, the bodies of three men were found in an automobile on the north side of Chicago. They had been stabbed to death. (Vol. I, R. 155-172) On March 3, 1979, petitioner told an Assistant State's Attorney he met three men in a restaurant in Chicago while in the company of three companions. One of the men told petitioner that he and his friends were members of a gang that had recently participated in "hits" on two Latin Kings. Eventually the group got into a car and drove to an alley. One of the men was then taken from the car by petitioner and his three companions who told the man that they were Latin Kings and that he was a King killer. All four of them then beat this individual. When they returned to the car the three men were stabbed to death by petitioner's companions. Petitioner was offered a knife by one of the killers but he refused to take it and did not participate in the stabbings. (Vol. II, R. 399-411) After the stabbings all of the group wiped the car to eliminate blood and fingerprints. (R. 411)

In closing argument, the prosecutor told the jury that petitioner did not have to be "an actual stabber to be guilty of murder." He went on to argue that what petitioner had told the State's Attorney was "enough to convict him of murder." (R. 521)

Following arguments the jury was instructed that to sustain the charge of murder, the State was required to prove that petitioner, or one for whose conduct he was

responsible, had performed the acts which caused the death of the victims and that the petitioner, or one for whose conduct he was responsible, had intended to kill or do great bodily harm to the victims or knew that his act would cause death or great bodily harm to the victims or knew that his acts created a strong probability of death or great bodily harm to the victims. (R. 578-581)

The jury returned verdicts finding petitioner guilty of three counts of murder on March 21, 1980. (R. 817-819)

Petitioner waived a jury for purposes of sentencing. On April 24, 1980, a sentencing hearing was held before the Circuit Court. Petitioner argued that he could not be sentenced to death where his guilt was premised on a theory of accountability. The trial court responded "basically if you read that section [of the Illinois Statute] it says that one who is convicted of, I believe its two or more murders, whatever the exact language is, which I don't have the statute before me,...but that's basically what the act says.[1] That motion is denied." (R. 627-628)

It was then stipulated for purposes of sentencing that petitioner had been found guilty of three counts of murder and that he was nineteen years old at the time those offenses occurred. (R. 629) The State then presented evidence in

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1 Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b)3 provides that a defendant may be sentenced to death if he "has been convicted of murdering two or more individuals...regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts;"

aggravation pursuant to Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(c). This provides that a sentencing court "shall consider...any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include, but need not be limited to, those factors set forth in subsection (b)." (Subsection (b) of the statute lists those factors which, if proven beyond a reasonable doubt, will render a defendant liable to the death penalty in Illinois. Ch. 38, Sec. 9-1(b)1-8.) The statute also provides that information relevant to "additional aggravating factors" may be presented "regardless of its admissibility under the rules governing the admission of evidence at criminal trials." Ch. 38, Sec. 9-1(e).

The nonstatutory aggravation presented by the State consisted of information that, at the age of sixteen, petitioner was approached by another youth who suggested that they "hit a Royal" because the Royals had shot a friend of petitioner's. Petitioner later fired a rifle into a crowd of people in a parking lot. A person in the crowd was fatally wounded. (R. 654-668) No evidence was presented that any criminal conviction or adjudication of delinquency resulted from these acts. After presenting evidence that petitioner had entered a plea of guilty to a charge of burglary at the age of seventeen, the State rested its case at sentencing. (R. 669)

Petitioner presented evidence in mitigation of his conviction for the three homicides. This consisted of

testimony by an investigator that when shown photographs of the victims, petitioner began crying and told the investigator that he had not wanted his companions to commit the murders, had begged them not to do it, and did not want to be any part of it. (R. 672-673)

At the conclusion of evidence the trial court sentenced petitioner to death. (R. 691)

The convictions and sentence of death were appealed to the Illinois Supreme Court. On appeal petitioner, relying on Mr. Justice White's concurrence in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), contended that the sentence of death was improper as it was based on a theory of accountability. He also challenged the sentencing court's consideration of the evidence of petitioner's involvement in the prior shooting as this had not resulted in a conviction. It was contended on appeal that if the Illinois statute permitted consideration of such nonstatutory aggravation, it was unconstitutional.

The Illinois Supreme Court held that petitioner was properly sentenced to death as the evidence showed that he intended to participate in "premeditated acts resulting in the death of the three victims." People v. Ruiz, ___ Ill.2d ___ at _ _ (1982) (Appendix A, pg. 11) The court stated that even "without considering the testimony...that Ruiz said he held a gun on the victims and felt their bodies to see if they were dead, the evidence is sufficient to prove Ruiz guilty of three murders beyond a reasonable doubt, along with the necessary intent required to establish

the aggravating factor set forth in section 9-1(b)(3)." ___ Ill.2d at ___. (Appendix A, pg. 12) The court distinguished Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), by holding that petitioner's "conduct was such as to support an inference that he possessed the intent to take the lives of the victims." ___ Ill.2d at ___. (Appendix A, pg. 16)

The court also held that as the prior shooting was admitted as nonstatutory aggravation the rules of evidence did not apply and this information was properly considered. ___ Ill.2d at ___. (Appendix A, pg. 15)

The federal question regarding standardless prosecutorial discretion to seek the death penalty was not specifically raised on appeal. However, this challenge to the validity of the Illinois statute was pending in several other cases at the time of petitioner's direct appeal. See People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981), cert. denied, ___ U.S. ___, 73 L.Ed.2d 1308, 102 S.Ct. ___ (1982) The issue of prosecutorial discretion decided in Lewis was one of the grounds for a dissent from the affirmance of petitioner's sentence. People v. Ruiz, ___ Ill.2d at ___. (Appendix A, pg. 16) (Simon, J., concurring in part and dissenting in part.)

On January 28, 1983, the Illinois Supreme Court denied a petition for rehearing.

V.

REASONS FOR GRANTING CERTIORARI

1.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A QUESTION POSED BY MR. JUSTICE WHITE'S CONCURRENCE IN LOCKETT V. OHIO AND LEFT UNDECIDED BY ENMUND V. FLORIDA: WHETHER THE EIGHTH AMENDMENT PERMITS THE EXECUTION OF A DEFENDANT IN THE ABSENCE OF A FINDING BY THE TRIER OF FACT THAT THE DEFENDANT INTENDED TO TAKE LIFE.

Luis Ruiz was convicted of murder and sentenced to death under Illinois law in the absence of a specific finding that he intended to take life. The Illinois Supreme Court held that this result did not violate Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), as there was evidence "to support an inference that [Ruiz] possessed the intent to take the lives of the victims." ___ Ill.2d at ___. (Appendix A, pg. ___) While it is correct that such an inference could have been drawn, the fact remains that neither the jury which convicted Ruiz of murder nor the trial court which determined that he was liable to the death penalty was required to make a finding that Ruiz intended to take life.

There was no evidence that Ruiz himself killed or attempted to kill anyone. Under Illinois law, as explained to the jury at trial, Ruiz' guilt of murder could rest on the mere finding that he engaged in conduct with the knowledge that his acts created a strong probability of great bodily harm to the victims. (Vol. II, R. 578-581) While the jurors

may have found that Ruiz possessed the intent to kill, they were not required to do so nor do the general verdicts returned indicate on which theory they found him guilty. (R. 817-819)

The trial judge who eventually sentenced Ruiz to death found the petitioner liable to the death penalty under Illinois law because of his conviction for two or more murders. (R. 627-628) The court found Ruiz liable to the death penalty without reference to the statutory language regarding an intent to kill more than one person or participation in "separate premeditated acts." Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b)3. Thus, the trial court found that Ruiz could be sentenced to death without making a finding that petitioner possessed the specific intent to take life. The Illinois Supreme Court affirmed the sentence of death after holding that the evidence showed Ruiz' intent to participate in "premeditated acts resulting in the death of the three victims," and that this supplied "the necessary intent required to establish the aggravating factor set forth in section 9-1(b)3." ___ Ill.2d at ___ and ___. (Appendix A, pg. 11 and 12)

In his concurrence in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), Mr. Justice White noted that the facts of that case "might well permit the inference that the petitioners did in fact intend the death of the victims. But there is vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death

in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done." 57 L.Ed.2d at 1004.

It is apparent from the holding in this case that Illinois has elevated conduct giving rise to an inference of intent to kill to an "ultimate fact," equivalent to possessing a purpose to kill. As noted above, the jury may have convicted petitioner upon a determination that he acted with knowledge that great bodily harm might result to the murder victims. Yet the sentencing court determined that the convictions rendered petitioner liable to the death penalty and the Illinois Supreme Court affirmed the death sentence on grounds that petitioner's conduct supported "an inference that he possessed the intent to take the lives of the victims."

It is respectfully submitted that these proceedings violate the Eighth Amendment. Because of the factual situation in Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), this Court was not required to resolve the question now presented. In Enmund there were no facts to support an inference that the defendant acted with the intent to take life. Since the Enmund decision, however, the United States Court of Appeals for the Fifth Circuit has held in Clark v. Louisiana State Penitentiary, 694 F.2d 75 (1982), that even where there was evidence that the defendant did the actual killing, because the jury was not required

to find that the defendant killed or possessed an intent to kill, the Eighth Amendment, as interpreted in Enmund, does not permit his execution. The court stated:

> Before the Constitution will allow this conviction and sentence, however, we must know that the jury found beyond any reasonable doubt that Clark, personally, did have that mind to kill....We are left with "a level of uncertainty and unreliability [in] the fact finding process that cannot be tolerated in a capital case." Beck v. Alabama (citations omitted)
>
> 694 F.2d at 78.

The decision of the Fifth Circuit is obviously at odds with the holding of the Illinois Supreme Court in this case. As in Clark it cannot be determined from the jury instructions and the verdicts returned that a finding was made that Luis Ruiz possessed an intent to kill. It is respectfully submitted that this situation will arise in numerous other cases where a conviction of murder and a sentence of death do not require a finding of intent to kill. This Court should grant certiorari to resolve the important constitutional question of whether such a result violates the Eighth Amendment.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A QUESTION CURRENTLY PENDING IN BARCLAY V. FLORIDA: WHETHER THE EIGHTH AMENDMENT BAN ON UNGUIDED DISCRETION IN CAPITAL CASES IS VIOLATED BY A SENTENCING SCHEME WHICH PLACES NO DEFINED LIMITS ON THE FACTORS WHICH MAY BE CONSIDERED AS REASONS FOR IMPOSING DEATH.

An Illinois defendant convicted of murder is liable to the death penalty only where the State proves beyond a reasonable doubt the existence of one or more statutorily defined factors. Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b)1-8. If one of these factors is found then the sentencing judge or jury is statutorily required to consider any "additional aggravating factors" relevant to the imposition of the death penalty. These factors may include but need not be limited to the statutory factors necessary to render the defendant liable to the death penalty. Ch. 38, Sec. 9-1(c). The nature of the additional factors in aggravation is not defined by statute. The admissibility of these nonstatutory factors is not limited by the rules of evidence. Ch. 38, Sec. 9-1(e). Thus, when an Illinois defendant has been found statutorily liable to the death penalty there are no restrictions on the factors which may then be considered as reasons for actually imposing death on that defendant. It is respectfully submitted that this scheme violates the Eighth Amendment ban on unguided sentencing discretion in capital cases. This conclusion follows from the holding of the United States Court of Appeals for the Fifth Circuit in

Henry v. Wainwright, 661 F.2d 56 (5th Cir., 1981), vacated on other grounds, ___ U.S. ___, 73 L.Ed.2d 1326, 102 S.Ct. 2922 (1982), aff'd 686 F.2d 311 (11th Cir., Unit B, 1982). A sentencing jury in a Florida case was instructed that in considering aggravating circumstances the jurors were not limited to statutorily defined factors. 661 F.2d at 57. The Fifth Circuit held that this unconstitutionally broadened sentencing discretion and violated this Court's decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). It can be seen from the statutory language noted above that Illinois judges and juries in capital cases are always allowed to consider undefined nonstatutory factors in aggravation.

The Henry decision has recently been followed in Profitt v. Wainwright, 685 F.2d 1227 (11th Cir., 1982), and State v. Bartholemew, 654 P.2d 1170, 1183 Wash. (1982). But see, Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir., 1982), cert. granted sub nom. Pulley v. Harris, No. 82-1095 (Mar. 21, 1983) The issue of whether a death sentence can be premised on the consideration of nonstatutory aggravating factors is currently before this Court in Barclay v. Florida, No. 81-6908, (oral argument scheduled for March 30, 1983.)

In its effort to obtain a death sentence for Luis Ruiz, the State of Illinois was allowed to introduce nonstatutory aggravation regarding petitioner's conduct as a juvenile which did not result in either a criminal conviction or an adjudication of delinquency. The Illinois Supreme Court

approved the use of this nonstatutory aggravation, holding that the evidence was properly admitted for the consideration of the trial judge in determining the penalty to be imposed. People v. Ruiz, ___ Ill.2d ___. (Appendix A, pg. 15)

Because the unrestricted consideration of undefined nonstatutory aggravation will inevitably lead to the kind of arbitrary and capricious imposition of death condemned by this Court in Furman v. Georgia, this Court should grant certiorari and reverse the sentence of death affirmed by the Illinois Supreme Court.

THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BY ALLOWING PROSECUTORS TO EXERCISE STANDARDLESS DISCRETION IN SEEKING THE DEATH PENALTY FOLLOWING A CONVICTION.

The Illinois Death Penalty Statute is unique. It is the only death statute that directs the prosecutor to exercise discretion to decide who shall be spared from the ultimate penalty during the middle of a death penalty proceeding. In every other state, a death penalty hearing automatically follows the conviction.

After a conviction for murder, a death penalty hearing can be held only "[w]here requested by the State." Ill.Rev.Stat., 1977, Ch. 38 Sec. 9-1(d). The Supreme Court of Illinois recognized that this statutory language places the decision on whether to convene a death hearing solely and squarely in the hands of the Illinois prosecutor. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979).

Four of the seven Justices now sitting on the Supreme Court of Illinois believe that the Illinois Statute violates the Eighth Amendment. See People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981).

In the Cousins case, three Justices -- Ryan, Clark, and Goldenhersh -- joined in a dissent. All three opined that giving the Illinois prosecutor the crucial decision, without any guiding standards, of who shall be spared from the ultimate penalty, violated the Eighth Amendment. A fourth, Mr. Justice Simon, adopted this position in Lewis and has adhered to it

in the present case.[2] Although the three Cousins dissenters reaffirmed their views in Lewis, each refused to join Justice Simon for reasons ranging from stare decisis to reliance that this Court would review the case. People v. Lewis, 430 N.E.2d at 1364. (Chief Justice Goldenhersh and Justices Ryan and Clark, concurring).

It is apparent from this Court's decisions that four of the seven Illinois Supreme Court Justices are correct in their view that the statute is unconstitutional. This Court in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), stated:

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishment, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. 428 U.S. at 188.

Applying Furman v. Georgia to the statutes being reviewed, this Court in Gregg held:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. (Emphasis added) 428 U.S. at 189.

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2 Justice Simon was not sitting on the court in November, 1979, when Cousins was decided.

In Illinois, the prosecutor has the unfettered discretion to decide whether to convene a death penalty hearing. The failure to "suitably direct" the prosecutor's post-trial discretion is the legal equivalent of the failure to "suitably direct" the sentencing body's discretion. Stated another way, by requiring the prosecutor to exercise standardless discretion during a death penalty proceeding, Illinois has recreated the pre-Furman problem.

In upholding the constitutionality of the Illinois death penalty statute, the Illinois Supreme Court has relied on the majority opinion in Cousins. People v. Lewis, 430 N.E.2d at 1354. In Cousins, the court recognized the the Illinois statute contained no guidelines to govern the prosecutor's decision whether to convene a death penalty hearing. However, the court referred to the aggravating and mitigating factors listed in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(b) and (c). The court then assumed that the prosecutor would be guided by these factors. However, as Justice Ryan pointed out in his dissent in Cousins, there is no requirement in the statute that the prosecutor be so guided, and therefore the prosecutor is free to ignore these factors in making his decision. People ex rel. Carey v. Cousins, 397 N.E.2d at 822. (Justice Ryan, dissenting).

In fact after nearly 6 years of operation of the Illinois Statute, facts and cases are now available to demonstrate the arbitrary and capricious exercise of discretion by local

prosecutors which demonstrates the unconstitutionality of the statute. For example, in People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1980), both the Illinois Attorney General and the local prosecutor admitted that the local prosecutor's predecessor had erroneously (and successfully) sought imposition of the death penalty. In two other cases, the prosecutors reversed their own decisions to seek imposition of the death penalty for reasons apparently unrelated to either the possible existence of an aggravating factor or the prosecutor's evaluation of the evidence. See People v. Glen Hipkins, 97 Ill.App.3d 579, 423 N.E.2d 208 (1981); People v. Michael Robinson, 87 Ill.App.3d 621, 410 N.E.2d 121 (1980). In People v. Walker, 84 Ill.2d 512, 419 N.E.2d 1167 (1981), the local prosecutor initially agreed to allow the defendant to plead guilty and receive a sixty-year sentence. The defendant later withdrew the plea. The prosecutor, citing "mistake" and concern for "conservation of tax dollars" as affecting his earlier opinion, changed his mind and requested the death penalty after defendant pleaded guilty once again.

A good example of the arbitrariness which exists in practice appears in a comparison of two similar central Illinois jurisdictions, Champaign and Sangamon Counties. Since the enactment of the Illinois Death Penalty Statute, prosecutors in Champaign County have sought the death penalty in every murder case in which they felt an aggravating factor was present. See People v. Robert Kirkpatrick, 70

Ill.App.3d 166, 387 N.E.2d 1284 (1979), (double murder); People v. Jerry Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 (1980) (double murder); People v. Michael LeCrone, 4th District, No. 15877 (murder-robbery); People v. Phillip Peeples, 4th District, Nc. 16759 (murder-attempted rape). This practice is in sharp contrast to the apparent policy in nearby Sangamon County, where although five murder defendants were subject to the death penalty because a statutory aggravating factor existed, the prosecution has never sought the death penalty. See People v. Ozark Nesbit, Sangamon County Case No. 78-CF-537 (second murder conviction); People v. Wesley Brents, 4th District, No. 16274 (murder-robbery); People v. James Lee, 4th District, No. 16273 (murder-robbery); People v. Vernon Hicks, 4th District, No. 16674 (murder-attempted murder-armed robbery); People v. Donald Groth, Sangamon County Case No. 80-CF702 (second murder conviction).

The different results in these cases demonstrate that the fear of guideless prosecutorial discretion under section 9-1(d), to which Justice Ryan's dissent in Cousins referred, has now been borne out in practice.

It is no answer to the constitutional problem to argue that Gregg decided the issue. This Court in Gregg recognized that certain types of pre-trial prosecutorial discretion are unavoidable. One of the arguments urged by the defendants in Gregg and its companion cases was that the inherent power of the prosecutor to undercharge, not charge at all, and plea bargain, all of which would allow a particular defendant to

escape the death penalty, rendered all death penalty statutes unconstitutionally arbitrary and capricious. In rejecting this argument, the Court viewed these prosecutorial decisions to be unavoidable and an integral part of our system.

Gregg allows the Illinois prosecutor to make the traditional pre-trial choices. But, the Illinois prosecutor is also given the power under the Illinois statute to make a post-trial choice and a vital one at that: whether to convene the penalty hearing and put the defendant's life in jeopardy. It is this choice, which was not an issue in Gregg, that we challenge here on Eighth Amendment grounds.

Thus, one major difference between the prosecutor's inherent pre-trial discretion attacked in Gregg and the prosecutor's discretion attacked here is that the former is unavoidable while the latter is fully avoidable.[3]

There is another major difference between the discretion approved in Gregg and that of Illinois prosecutors. In Georgia, the only way for a prosecutor to avoid a death penalty hearing is to refuse to charge a capital offense. Such undercharging would violate his duty as a prosecutor and the public trust. As three members of this Court found, however, very few prosecutors would arbitrarily ignore both their duty and public trust by failing to charge a capital offense, when warranted by the evidence, simply to avoid a death penalty. Gregg v.

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3 As this Court recognized in Gregg, to prohibit the traditional charging discretion in a death penalty case would in effect "outlaw" capital punishment. (428 U.S. at 199, n. 50). Our attack on the Illinois statute in no way challenges the traditional charging power of the prosecutor.

Georgia, 428 U.S. at 224-5 (White, J., Burger, C. J., and Rehnquist, J.).

In contrast to Georgia, the discretion afforded prosecutors in Illinois is totally different. As discussed above, the Illinois statute contains no standards whatever which govern the prosecutor's decision whether to seek the death penalty. The Illinois statute does not even require that the prosecutor request a death penalty hearing if his evidence establishes one or more of the statutory aggravating factors. Therefore, in contrast to Georgia, an Illinois prosecutor is free to not seek the death penalty as he sees fit, and that decision violates neither his duty nor the public trust.

In summary, the discretion granted Illinois prosecutors is unique and totally avoidable. Such discretion has not yet been reviewed by this Court. As demonstrated, the discretion afforded Illinois prosecutors is not a component of the traditional charging power. Also as demonstrated, that discretion is totally without standards. Therefore, by interjecting needless complications into the death sentencing process, the Illinois statute certainly has not "minimize(d) the risk of arbitrary and capricious" death sentences. Gregg v. Georgia, 428 U.S. at 189. Finally, although a majority of the Illinois Supreme Court have found the Illinois statute does violate the Eighth and Fourteenth Amendments, three of those justices have deferred to this Court for a final resolution of the issue.

For these reasons, certiorari should be granted.

VI.

CONCLUSION

For the foregoing reasons, Luis Ruiz, petitioner, respectfully requests that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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Docket No. 53415—Agenda 1—May 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. LUIS RUIZ, Appellant.

CHIEF JUSTICE RYAN delivered the opinion of the court:

By information filed in the circuit court of Cook County, Luis Ruiz and Juan Caballero were charged with the murders of Michael Salcido, Arthur Salcido, and Frank Mussa. The defendants were also charged with armed violence (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 33A—2) and unlawful restraint (Ill. Rev. Stat. 1979, ch. 38, par. 10—3(a)) as to each of the victims. Ruiz and Caballero were granted a severance and were subsequently tried simultaneously before a single judge, making use of two separate juries. At the conclusion of trial, the Ruiz jury returned a verdict of guilty on all counts. The prosecutor requested a hearing to consider whether the death penalty should be imposed. The defendant waived a jury and, after hearing evidence in aggravation and mitigation, the trial judge sentenced Luis Ruiz to death. (Ill. Rev. Stat., 1978 Supp., ch. 38, pars. 9—1(d), (h).) The sentence was stayed (73 Ill. 2d R. 609(a)), pending direct appeal to this court pursuant to Rule 603 (73 Ill. 2d R. 603). Caballero was also convicted of three counts of murder, three counts of armed violence and three counts of unlawful restraint. After a separate sentencing hearing he was also sentenced to death. We consider in this appeal only the conviction and sentence of Luis Ruiz.

For the reasons expressed in this opinion, we affirm the conviction and sentence of death.

On the evening of February 24, 1979, Arthur Salcido, then 19 years of age, and Frank Mussa, 16 years of age, both of Princeton, Illinois, together with Arthur's brother, Michael Salcido, 17 years of age, drove from Princeton to Chicago. Michael had been visiting his brother in Princeton, and that night the three boys went to his mother's apartment in Chicago. The boys had borrowed a car in Princeton and arrived in the city about midnight. At approximately 1 a.m., the three youths left the apartment and drove to an all-night restaurant in the neighborhood.

Defendant Luis Ruiz, aged 19, Juan Caballero, Placedo Laboy, and a fourth youth named Aviles, encountered Arthur, Michael and Frank in the restaurant. Michael ap-

proached Ruiz and inquired whether he knew where some marijuana could be obtained. Ruiz responded that he did not have any marijuana and he did not know where any could be obtained. Michael then asked Ruiz if he knew a person named Jose Cortez, a Latin Eagle. Ruiz, who was himself a member of a rival gang, the Latin Kings, asked Michael if he was a Latin Eagle. Michael responded affirmatively. Ruiz then told Michael that he and his companions were also Latin Eagles. At this point, Michael began to brag to Ruiz that he had ridden on "hits" with the Eagles and had been the driver on one such "hit" by the Eagles on two Latin Queens, the female companions and counterparts of the Latin Kings. After this exchange, Ruiz told Michael that he did in fact know where to obtain marijuana and that he would show Michael where to get it.

All got into the victims' automobile with Michael, Arthur and Frank in the front. Ruiz and his companions were in the back seat. Ruiz directed the driver into an alley where Ruiz and his companions got out of the car. They told Michael to accompany them down the alley and they would show him the location of the marijuana. Once they were out of sight of the automobile, Ruiz and his friends revealed that they were not Eagles but were instead Latin Kings, after which they beat Michael Salcido to the ground. When the beating was over, Laboy produced a gun and Aviles a knife, and they all marched Michael back to the car.

All seven youths then got into the car at the direction of Ruiz and his group. Laboy took over as driver, with Ruiz occupying the back seat along with Michael. Laboy drove to a second alley which was T-shaped. He drove some distance down the "T" where he stopped the car. Laboy and Caballero then took Michael and Frank around the corner of the alley and forced them to lie face down in the snow. Ruiz remained with the car while Aviles stabbed and killed Arthur Salcido in the automobile. Laboy then brought Frank Mussa back to the car, took the same knife, and stabbed Frank Mussa to death. Finally, Caballero returned with Michael Salcido and stabbed him to death in the back seat of the car. The members of the group then took articles of clothing from the trunk of the victims' automobile and attempted to wipe the vehicle clean of fingerprints. After completing this task, Ruiz and the others all left the scene. Ruiz and Caballero were arrested on March 8, 1979, and charged with the offenses described above.

In this appeal, defendant argues that because there is no evidence that he actually did any of the acts which resulted in death, his conviction on the principle of accountability cannot form the basis for imposition of the death penalty under the Illinois statute (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1). Further, if the statute allows death to be imposed on a defendant who is merely accountable for the conduct of another, such provision is unconstitutional. In addition, the defendant argues that the procedure employed at trial denied his right to a severance and that he has not been proved guilty beyond a reasonable doubt.

We turn first to a consideration of whether the proof adduced at trial is sufficient to sustain a conviction for murder, armed violence, and unlawful restraint. We agree with the defendant that there is no direct evidence establishing that Ruiz ever struck any of the blows that resulted in the deaths of the victims. However, the case was submitted to the jury with proper instructions setting forth the principle of accountability, and the record proves Ruiz' guilt on each charge beyond a reasonable doubt as a willing participant in the criminal enterprise. There is no doubt that Ruiz was legally accountable for the conduct of his companions and, as such, shares equally in their guilt.

In *People v. Rybka* (1959), 16 Ill. 2d 394, this court upheld the defendants' murder convictions predicated solely upon their being accountable for the actors' conduct, even though they were not present during the crime. In *Rybka*, 13 persons embarked upon a venture to "get a negro." (16 Ill. 2d 394, 400.) They departed in two groups, employing separate vehicles, an Oldsmobile and a Chrysler. The two groups started out together, being led by the Oldsmobile, but soon became separated. The occupants of the Chrysler eventually disbanded and went home without incident. The other group, however, accomplished their purpose when one of them struck the victim in the head with a hammer. Despite the fact that defendants Gorski and Budz were occupants of the Chrysler and consequently not present when the crime was committed, this court upheld their convictions for murder and observed:

> "Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction as a principal for a crime committed by another in furtherance of the ven-

ture. *People v. Tarver*, 381 Ill. 411; *People v. Rudecki*, 309 Ill. 125." (*People v. Rybka* (1959), 16 Ill. 2d 394, 405.)

Active participation has never been a requirement for the imposition of criminal guilt upon the theory of accountability. *People v. Morgan* (1977), 67 Ill. 2d 1, 9; *People v. Kessler* (1974), 57 Ill. 2d 493, 497-98, *cert. denied* (1974), 419 U.S. 1054, 42 L. Ed. 2d 650, 95 S. Ct. 635; *People v. Allen* (1974), 56 Ill. 2d 536, 541, *cert. denied* (1974), 419 U.S. 865, 42 L. Ed. 2d 102, 95 S. Ct. 120; *People v. Hill* (1968), 39 Ill. 2d 125, 134-35, *cert. denied* (1968), 392 U.S. 936, 20 L. Ed. 2d 1394, 88 S. Ct. 2305; *People v. Johnson* (1966), 35 Ill. 2d 624, 626; *People v. Richardson* (1965), 32 Ill. 2d 472, 476-77, *cert. denied* (1966), 384 U.S. 1021, 16 L. Ed. 2d 1023, 86 S. Ct. 1935.

Section 5—2(c) of the Criminal Code of 1961 provides that a person is legally accountable for conduct of another when:

> "Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. ***" Ill. Rev. Stat. 1977, ch. 38, par. 5—2(c).

In this case, the testimony of Julio Lopez and the assistant State's Attorney, to whom Ruiz made incriminating statements, establishes that Ruiz was a principal character in the common enterprise obviously bent on committing acts of violence upon the victims. Ruiz admitted to the State's Attorney that he initiated the plan to mislead the victims into believing that Ruiz and his group were Latin Eagles. This admission was corroborated by Julio Lopez, who testified that on March 2, 1979, Ruiz, in the presence of Placedo Laboy and himself, stated, "Do you know who 'offed' those three guys in that car? It was us." Ruiz then went on to relate the details of the event, including the fact that they had misled their victims into believing they were Latin Eagles instead of Latin Kings. The only conceivable purpose of the deception was to allow Ruiz and his friends to maneuver the victims into a situation where they could avenge the "hit" upon the Latin Queens, of which Michael had bragged earlier. Having aided Caballero and the others in their plot to do violence to these victims by deceiving them and getting them into the car, Ruiz became accountable for the conduct of each member of the group. In fact, the evidence discloses that it was Ruiz who told the victims he could procure marijuana for them and who

directed them to drive into the alley where Ruiz and his companions administered a severe beating to Michael. After the beating, Ruiz again entered the car, which then proceeded to the location where the victims were brutally murdered. The defendant argues that his mere presence at the scene of the crime does not make him accountable for the murders. The evidence shows much more than the defendant's mere presence. His continued presence during the commission of all three murders, plus his participation in the attempt to obliterate fingerprints after the crimes were committed, are alone sufficient to show " 'a common design to do an unlawful act to which all assent.' " (*People v. Morgan* (1977), 67 Ill. 2d 1, 10, *cert. denied* (1977), 434 U.S. 927, 54 L. Ed. 2d 287, 98 S. Ct. 411; *People v. Washington* (1962), 26 Ill. 2d 207, 209.) Later in this opinion we shall discuss additional evidence concerning the extent of Ruiz' involvement.

We also reject the defendant's assertion that because he did not take the knife and did nothing to facilitate the actual killings he had somehow withdrawn from the enterprise and ceased to be accountable for the conduct of the others. Once a person becomes accountable for the conduct of another, he remains so until he detaches himself from the criminal enterprise. This court has held that no withdrawal is possible until the person desiring to withdraw effectively communicates his intention to the others so as to give them an opportunity to follow his example and to do so before the act with which he is charged has commenced, or has become so inevitable that it could not reasonably be stayed. (*People v. Broum* (1962), 26 Ill. 2d 308; *People v. Rybka* (1959), 16 Ill. 2d 394, 406.) The defendant in this case has failed to produce any evidence of his withdrawal. In point of fact, all inferences to be drawn from the record are to the contrary. If Ruiz desired to withdraw from the murders of these three boys, he had ample opportunity even after Michael had been beaten. The fact that Ruiz got into the car and rode to the second alley, and remained during the commission of all three murders, destroys any notion that he was no longer participating in the criminal enterprise. Further, as noted earlier, after the crime had been completed, all of the perpetrators, including Ruiz, remained at the scene to wipe fingerprints off of the vehicle. Evidence of events occurring after the crime had been committed is competent to show participation in the crime itself. *People v. Kolep* (1963), 29 Ill. 2d 116, 120.

We turn next to the matter of how this trial was conducted and the issue raised concerning severance. The defendant's contention is basically that although his motion for a severance was granted, the trial court negated its effect by conducting a simultaneous trial before two juries and ruling that if either defendant took the stand to testify, both juries would be present. The defendant argues that this action deprived him of his right to a severance and amounted to a denial of a fair trial.

An accused does not have a right to be tried separately from his companions when charged with offenses arising out of a common occurrence. (*People v. Yonder* (1969), 44 Ill. 2d 376, 386, *cert. denied* (1970), 397 U.S. 975, 25 L. Ed. 2d 270, 90 S. Ct. 1094; *People v. Watt* (1942), 380 Ill. 610, 613.) The question of whether a severance should be granted in a particular case is a matter largely within the discretion of the trial judge. (*People v. Henderson* (1967), 37 Ill. 2d 489, 492, *cert. denied* (1967), 389 U.S. 943, 19 L. Ed. 2d 297, 88 S. Ct. 305.) The primary question to be considered is whether the defenses of the several defendants are so antagonistic that any or all of them could not receive a fair trial unless a severance is granted. (*People v. Brooks* (1972), 51 Ill. 2d 156, 166; *People v. Bernette* (1970), 45 Ill. 2d 227, 241, *rev'd on other grounds* (1971), 403 U.S. 947, 29 L. Ed. 2d 858, 91 S. Ct. 2290-91; *People v. Gendron* (1968), 41 Ill. 2d 351, 357, *cert. denied* (1969), 396 U.S. 889, 24 L. Ed. 2d 164, 90 S. Ct. 179.) Here, neither Ruiz nor Caballero gave notice that he intended to proceed by way of any defense which would be inconsistent with their presence at the crime scene or their mental capacity to commit these offenses. It would be pure speculation to conclude that either of these defendants was forced not to testify, or was otherwise prejudiced by the fear that accusatory testimony might be delivered by the other in retaliation. Mere apprehension of a particular result will not sustain an allegation of prejudice to the accused. *People v. Yonder* (1969), 44 Ill. 2d 376, 386, *cert. denied* (1970), 397 U.S. 975, 25 L. Ed. 2d 270, 90 S. Ct. 1094; *People v. Gendron* (1968), 41 Ill. 2d 351, 357, *cert. denied* (1969), 396 U.S. 889, 24 L. Ed. 2d 164, 90 S. Ct. 179.

Moreover, the motion for severance was granted in this case primarily to avoid possible conflict with *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. Caballero had apparently made certain incriminating statements which implicated Ruiz. To avoid the pos-

sibility that these statements would be admitted into evidence as a confession, regardless of whether Caballero took the stand, and thereby violate the *Bruton* rule as to Ruiz, the trial court employed two juries. Under the procedure used, including the ruling that both juries would hear the testimony of either defendant, any possible conflict with *Bruton* was avoided. The reason is that if Caballero took the stand and, consistent with his prior statement, implicated Ruiz, he would be in effect a State's witness against him, subject to cross-examination the same as any other witness. In this situation the *Bruton* problem is avoided because the out-of-court statement would not be put into evidence. On the other hand, if Caballero did not take the stand and the State attempted to introduce the statement as proof of Caballero's guilt, any potential conflict with *Bruton* could be avoided by removing the Ruiz jury. In addition, even if the trial judge had ruled that both juries would be present during cross-examination, *Nelson v. O'Neil* (1971), 402 U.S. 622, 29 L. Ed. 2d 222, 91 S. Ct. 1723, would compel us to hold that such ruling would be correct. In *Nelson*, the Supreme Court held that in a joint trial before a single jury a defendant's sixth amendment rights were not violated when his codefendant took the stand and was subsequently impeached with a prior statement implicating the defendant.

We hold therefore that since both juries would have been entitled to hear the testimony of these defendants, the trial court's granting of the motion upon these conditions was not an abuse of discretion, nor did it prejudice defendant Ruiz so as to deny him a fair trial. There remains, however, the question of whether the procedure of employing two juries in this fashion amounts to a *per se* denial of some constitutional protection.

This identical issue has been presented and resolved in favor of the multiple-jury procedure as a device to avoid the *Bruton* confrontation problem. In *United States v. Sidman* (9th Cir. 1972), 470 F.2d 1158, *cert. denied* (1973), 409 U.S. 1127, 35 L. Ed. 2d 260, 93 S. Ct. 948, the court, recognizing the potential for error of constitutional proportions, nonetheless found that multiple juries did not deny an accused any of his rights provided by the Constitution or the Federal Rules of Criminal Procedure. The same conclusion has been reached in other cases. (See *United States v. Rowan* (6th Cir. 1975), 518 F.2d 685, *cert. denied* (1975), 423 U.S. 949, 46 L. Ed. 2d 284, 96 S. Ct. 368; *United*

States v. Rimar (6th Cir. 1977), 558 F.2d 1271, *cert. denied* (1978), 435 U.S. 922, 55 L. Ed. 2d 515, 98 S. Ct. 1484.) While we, too, recognize the possibility for prejudicial error resulting from confusion at trial inherent in this procedure, we conclude that in this case no such error exists.

From the onset the trial judge exercised extreme caution in instructing each member of the two juries as to what exactly was going on. The record is replete with reminders and admonishments to the effect that neither jury is to discuss any aspect of the case with the other. Each side was well aware of the presence of the other jury, and counsel, along with the court, took great care in insuring that each jury heard only that evidence which was relevant to each respective case. Due to the nature of the testimony, most of the evidence offered at trial was admissible against both defendants. The record fails to disclose a single incident of confusion or impropriety. The Supreme Court has observed that a defendant in a criminal case is entitled to a fair trial, not a perfect one. (*Lutwak v. United States* (1952), 344 U.S. 604, 619, 97 L. Ed. 593, 605, 73 S. Ct. 481, 490.) Based upon the record now before us, we believe that mandate has been fulfilled in this case.

The defendant next argues that the Illinois statute providing for imposition of the death sentence was not intended to be applied to those persons found guilty of murder under the theory of accountability. We do not agree. The statute does not specifically preclude the imposition of the death penalty if the defendant's conviction is based on accountability. Section 9—1(c)(5), however, lists, as a mitigating factor, "the defendant was not personally present during the commission of the act or acts causing death." (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(c)(5).) Thus, if a defendant were convicted of murder under the accountability theory, and was not personally present when the acts causing death were committed, as was the case with some of the defendants in *People v. Rybka* (1959), 16 Ill. 2d 394, mentioned above, this fact may be considered in mitigation. By contrast, there is no provision in the statute for special consideration of a defendant convicted on the theory of accountability when he is personally present when the acts causing death are committed. It would appear that the typical case in which a defendant would not be present during the act or acts causing death would be a case in which the defendant would be found guilty of murder on the basis of accountability. If the legislature had in-

tended that under the accountability theory, and was not personally present when the acts causing death were committed, as was the case with some of the defendants in *People v. Rybka* (1959), 16 Ill. 2d 394, mentioned above, this fact may be considered in mitigation. By contrast, there is no provision in the statute for special consideration of a defendant convicted on the theory of accountability when he is personally present when the acts causing death are committed. It would appear that the typical case in which a defendant would not be present during the act or acts causing death would be a case in which the defendant would be found guilty of murder on the basis of accountability. If the legislature had intended that the death penalty would not be applicable where the defendant is found guilty of murder on the basis of accountability, there would have been no reason to provide for his absence as a mitigating factor.

The defendant notes that the legislature, in cases of felony murder, precludes the imposition of the death penalty if the defendant did not actually kill the individual. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(b)(6)(a).) The defendant argues that this establishes the legislature's intent that any defendant who does not strike the fatal blow should not be sentenced to death. This conclusion does not follow. Since the only intent necessary to support a felony-murder conviction is that to commit the underlying felony (*People v. Hickman* (1974), 59 Ill. 2d 89, *cert. denied* (1975), 421 U.S. 913, 43 L. Ed. 2d 779, 95 S. Ct. 1571; *People v. Auilar* (1974), 59 Ill. 2d 95, 101; *People v. Miller* (1980), 89 Ill. App. 3d 973, 979; *People v. Nelson* (1979), 73 Ill. App. 3d 593, 595; Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)(3)), the legislature provided that the death penalty can only be imposed upon the one actually doing the killing, to avoid the possibility of a person being put to death without having possessed even the general intent for the crime of murder. Also, as noted above, it provided that a mitigating factor in other murders, obviously based on accountability, is the lack of personal presence. If the legislature intended that the death penalty not be imposed on those who were personally present but did not actually kill in every case, it could have so provided. The trial court properly noted that accountability is not incompatible with the death penalty in cases other then felony murders.

In addition to the evidence as to Ruiz' involvement previously noted, some other evidence not previously recited is

extemely significant. Julio Lopez, a former member of the Latin Kings gang, testified that Ruiz, in telling him of the murders, said that he, Ruiz, held a gun on the victims while the others did the stabbing and that he checked the bodies afterwards to see if the victims were dead. The defendant contends that since Lopez did not include these comments in his prior statement to the assistant State's Attorney, they are not worthy of belief. The degree to which Lopez' testimony may have been discredited must be determined by the trier of fact at the trial, or by the trial judge at the sentencing hearing, if the hearing is before the judge and not a jury. We cannot say, as a matter of law, that Lopez' testimony had no probative value. On the contrary, it strongly supports the verdicts of guilty and the judge's decision as to the penalty. Although the statements concerning the gun and checking of the bodies do not show that Ruiz struck the actual blow that killed the victims, they do show a substantial involvement by Ruiz in the actual killings.

Also, the assistant State's Attorney who questioned Ruiz testified that, in relating his story, Ruiz told him that after they had beaten Michael and before arriving at the alley where the victims were murdered, Placedo Laboy stated that they would have to kill these people because they had seen their faces. The assistant State's Attorney also testified that Ruiz told him that when the boys were being stabbed, he stayed outside the car and that, after Frank had been stabbed, Laboy handed him the knife, but he refused to take it. Michael was then brought to the car, pushed into the back seat, and stabbed by Juan Caballero. Although Ruiz consented to be interviewed by the assistant State's Attorney, he refused to give a statement in the presence of a court reporter. The assistant State's Attorney's testimony was based on a memorandum he had prepared following his interview with Ruiz and also based on his memory. In any event, all of the evidence, both favorable and unfavorable to the accused, was properly presented to the jury at trial, and the judge during sentencing, for their consideration as to its persuasiveness. The defendant has failed to establish that any of the incriminating evidence was not worthy of belief as a matter of law.

The defendant relies heavily on Justice White's concurring opinion in *Lockett v. Ohio* (1978), 438 U.S. 586, 621-28, 57 L. Ed. 2d 973, 1000-04, 98 S. Ct. 2954, 2981-85 in support of his contention that the death penalty cannot be

constitutionally imposed upon a defendant guilty of murder on the basis of accountability. We find this reliance to be misplaced. Justice White's opinion does not state that a person who does not do the actual killing may not constitutionally be sentenced to death. The opinion, instead, is concerned with the question of intent. In that case the defendant was participating in a planned robbery and was seated in a car while her companions, in the course of the robbery, killed a person. Justice White expressed the concern that although proved guilty beyond a reasonable doubt, it was not established that Lockett possessed any intent to kill independent of the person who actually performed the acts resulting in death. As noted earlier, under our statute, the death penalty will not be imposed where a defendant is convicted of felony murder unless he performed the acts which resulted in death. This limitation insures that an inference of at least the general intent sufficient to support a murder conviction will be present before someone is put to death for felony murder. Where guilt is premised on the accountability theory the intent of the actor is imputed to the defendant but his absence from the crime scene will be a mitigating factor that would prevent imposition of the ultimate penalty in cases like *Rybka*. Moreover, the concurring opinion of Justice White recognizes that the facts of a particular case might well permit an inference that the defendant had the requisite intent independent of any imputed to him by way of accountability. This conforms to the settled law of this State holding that the intent to take a life may be inferred from defendant's acts and the circumstances surrounding the commission of the offense. *People v. Jones* (1979), 81 Ill. 2d 1, 9-10; *People v. Muir* (1977), 67 Ill. 2d 86, *cert. denied* (1977), 434 U.S. 986, 54 L. Ed. 2d 481, 98 S. Ct. 615 (partially overruled in *People v. Harris* (1978), 72 Ill. 2d 16, 27); *People v. Koshiol* (1970), 45 Ill. 2d 573, *cert. denied* (1971), 401 U.S. 978, 28 L. Ed. 2d 329, 91 S. Ct. 1209; *People v. Coolidge* (1963), 26 Ill. 2d 533.

In this case Ruiz' intent to participate in the premeditated acts resulting in the death of the three victims is established beyond a reasonable doubt, whether considered under the accountability statute (Ill. Rev. Stat. 1977, ch. 38, par. 5—1 *et seq.*), or whether his intent is judged solely from his own acts and conduct. In support of this conclusion it is again appropriate to reiterate Ruiz' participation in this series of tragic events.

It was Ruiz who first deceived the three victims by tell-

ing them that he was a Latin Eagle when they bragged to him that they had participated in a "hit" on some Latin Queens. It was Ruiz who directed that they all get into the victims' car and drive to the first alley. Ruiz took Michael down the alley and participated in beating him to the ground. Ruiz told the assistant State's Attorney that his companions said that they would have to kill the three boys. After learning this, when they stopped in the second alley, Ruiz did not depart but stayed while each of the three was systematically and ruthlessly executed. Arthur Salcido was stabbed a total of eight times in the chest, and his throat was cut completely across, severing his windpipe, as well as the major arteries on either side of his neck. Frank Mussa was stabbed a total of 21 times: three times in the neck, three times in the chest and 15 times in the back. Michael Salcido was stabbed a total of 18 times: 10 times in the face and neck, five times in the abdomen and three times in the back. Ruiz never told either Lopez or the assistant State's Attorney that he protested while all of these blows were being struck. In fact, nothing in the record shows what he was doing during the considerable time that it took to perform these acts, which must have been accomplished in the face of extreme effort on the part of the victims to preserve themselves and through greater efforts on the parts of the participants to overcome the victims' defenses. In any event, when all was finished, Ruiz assisted the others in wiping the car free of fingerprints and then walked away from the scene with his companions. Even without considering the testimony of Lopez that Ruiz said he held a gun on the victims and felt their bodies to see if they were dead, the evidence is sufficient to prove Ruiz guilty of three murders beyond a reasonable doubt, along with the necessary intent required to establish the aggravating factor set forth in section 9—1(b)(3).

The defendant also contends that the indictment did not sufficiently inform him that the death penalty would be sought. In *People v. Brownell* (1980), 79 Ill. 2d 508, *appeal dismissed* (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101 S. Ct. 59, this court held that the charge in the indictment constitutes sufficient notice that the death penalty would be sought. Although Ruiz acknowledges that he was charged with killing three people, which, under the statute, would make him eligible for the death penalty, he contends that the statute removes accountability convictions from

the death penalty. Therefore he argues that the charge failed to inform him that the death penalty would be sought. Since our statute provides that a person convicted of felony murder is not subject to the death penalty unless he actually did the killing, Ruiz argues that this provision of the statute, by implication, prohibits the imposition of the death penalty where one is convicted of murder on the basis of accountability. This argument has been disposed of by our holding above that section 9—1(b)(6) does not remove accountability convictions as a foundation for the death penalty. Consequently, based upon *Brownell*, the defendant was sufficiently informed that the death penalty would be sought.

It is appropriate to distinguish the result here reached from another recent decision of this court. In *People v. Gleckler* (1980), 82 Ill. 2d 145, we vacated the death sentence imposed by a jury partly because of the mitigating factors presented and the extent of the defendant's participation relative to his codefendants'. In *Gleckler*, although the accused did in fact fire shotgun blasts into the heads of two young boys, his overall involvement in the episode was shown to be that of a follower. A great deal of evidence was produced in mitigation to show the accused's limited mental capacity, his docile personality, and his "definite propensity to go along with whatever events were happening at the time." (82 Ill. 2d 145, 164.) It was also established that the defendant was an alcoholic and that he had been drinking on the night of the murders. We also considered that Gleckler did not have a criminal record. These factors in mitigation, coupled with the fact that Theodore Parsons, charged with the same murders and far more culpable than Gleckler, received only a prison term, led a majority of this court to conclude that "Gleckler, with no criminal history, the personality of a doormat, and a problem with alcohol, was not the ringleader in this sordid affair; nor are his rehabilitative prospects demonstrably poorer than those who received imprisonment terms. Our revulsion toward this crime and our lack of sympathy for Gleckler cannot justify executing only him." *People v. Gleckler* (1980), 82 Ill. 2d 145, 171.

By contrast, the trial judge in this case was presented with no mitigating factors other than the testimony of one police officer to whom the defendant had expressed remorse and the argument of counsel that Ruiz did not take an active part in the crime because he feared for his own

life. However, although Ruiz did not stab the victims, he was not a "follower" or a "doormat." We believe the inference that he actively participated in and directed the commission of crime could easily have been drawn by both the jury and the judge during the sentencing hearing. It is inconceivable that these three victims would calmly submit to their own systematic slaughter without resistance. It would likewise be absurd to preclude the inference that *all* of the perpetrators actively participated in overcoming such resistance by restraint and other acts of violence until each victim was finally killed. We cannot, therefore, reverse the trial court's ruling that no mitigating factors sufficient to preclude the death penalty had been proved. We believe that imposing the ultimate penalty of death based upon the evidence presented against Ruiz and the inferences properly drawn therefrom does not amount to cruel and unusual punishment. Nor is this case like *Gleckler*, where sufficient mitigating factors precluded imposition of the ultimate penalty.

Finally, the defendant asserts that the court improperly considered evidence in aggravation. At the sentencing hearing, both sides stipulated that if the State called all of its witnesses previously produced at trial, they would testify similarly. Thereafter, the State introduced testimony establishing that Thomas Griebell, age 16, died as a result of a gunshot wound to the head which he received on July 13, 1976. The State next called an assistant State's Attorney who laid the foundation for introduction of a statement, signed by Luis Ruiz, that admitted in great detail the events of July 13, 1976. The document related in essence that Luis Ruiz fired a rifle from a gangway into a crowded parking lot across a street and thereafter saw a person in the parking lot grab his head and fall to the ground. This act was done in furtherance of plans made earlier that day by Ruiz and others to "hit a Royal." The parking lot into which Ruiz fired was adjacent to a restaurant used as a meeting place for members of that gang. The defendant objected to the introduction ofthis document and now contends that, since no conviction resulted from the alleged event, it was error for the court to consider it. In *People v. La Pointe* (1981), 88 Ill. 2d 482, we discussed this question in detail and held that a judge conducting a sentencing hearing is not limited to considering evidence that would only be admissible during a trial but could exercise wide discretion in the types of evidence used to assist

him in determining the punishment to be imposed. The defendant's argument in our case is clearly answered by the statute. Section 9—1(e) provides that during the sentencing hearing any evidence relative to the aggravating factors set out in subsection (b) (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)) may be presented "under the rules governing the admission of evidence at criminal trials." This section further provides that any additional aggravating factor may be presented "regardless of its admissibility under the rules governing the admission of evidence at criminal trials." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(e).) The evidence objected to did not pertain to an aggravating factor set out in subsection (b). The rules governing the admissibility of evidence at criminal trials therefore would not apply to this statement of the defendant. The statement was properly admitted for the consideration of the trial judge in determining the penalty to be imposed.

This case has been held under advisement pending the filing of an opinion by the United States Supreme Court in *Enmund v. Florida* (1982), ___ U.S. ___, 73 L. Ed. 2d 1140, 102 S. Ct. 3368. The holding of the majority in that case is stated as follows:

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not." ___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1151, 102 S. Ct. 3368, 3376-77.

In *Enmund v. Florida* the court emphasized that the focus must be on the culpability of the defendant Enmund, not on that of those who, during the course of the robbery, shot the victims. Enmund was a robber and aided and abetted a robbery, in the course of which murder was committed by others. Enmund's criminal culpability was thus limited to his participation in the robbery and his punishment was tailored to his personal responsibility and moral guilt. (___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1152, 102 S. Ct. 3368, 3377.) The evidence showed that Enmund, although intending to participate in the robbery of the victims, stayed in an automobile while his two accomplices approached the victims' home, robbed them and then killed both victims after one of them had shot and wounded one

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of the accomplices.

> "Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder." ___ U.S. ___, ___, 73 L. Ed. 2d 1140, 1152, 102 S. Ct. 3368, 3377.

We have detailed above the participation of Luis Ruiz in the three murders involved in this case. In *Enmund v. Florida* the defendant was found guilty of *felony* murder solely on the basis of his participation in the commission of the felony, robbery. In our case Ruiz was not tried or convicted on the theory of felony murder. We noted above in this opinion that, under our statute, the death penalty cannot be imposed for felony murder unless the defendant actually kills the victim. (Ill. Rev. Stat., 1978 Supp., ch. 38, par. 9—1(b)(6)(a).) In our case Ruiz was present throughout the violent episode, actively participated, except for striking a fatal blow, and his conduct was such as to support an inference that he possessed the intent to take the lives of the victims.

Nothing in the holding or the language of the majority opinion in *Enmund v. Florida* requires a conclusion in this case contrary to that reached above.

For the reasons stated, the judgments of conviction and sentence of death of the circuit court of Cook County are affirmed. The clerk of this court is directed to enter an order fixing Wednesday, March 16, 1983, as the date on which the sentence of death entered in the circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and the wardens of the Illinois State Penitentiary at Menard and Joliet.

Judgment affirmed.

X JUSTICE SIMON, concurring in part and dissenting in part:

I dissent from the imposition of the death sentence for the reasons set forth in my dissent in *People v. Lewis* (1981), 88 Ill. 2d 129, 179 (Simon, J., dissenting). I also dissent from the majority's holding that the death penalty statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1) covers defendants such as Luis Ruiz who are convicted of murder under the theory of accountability. My judgment is that the intent of the legislature and the plain language of the statute restrict the scope of the death penalty to defendants

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who kill or who actually possess the intent required for murder, and exclude from its coverage those individuals who are convicted of murder under a theory which does not require that they do the killing and under which "intent" to kill may be imputed.

The death penalty provisions appear in subsections (b) and (c) of the murder statute, which is section 9—1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b), (c).) Subsection (a) of the statute, to which the next two subsections refer, does not mention accountability or imputed intent other than through felony murder, and in fact states clearly that "[a] person who kills an individual without lawful justification commits murder if, *in performing the acts which cause the death* ***." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a).) The crime of murder by accountability is not defined in section 9—1, or anywhere specifically in the Criminal Code of 1961; instead, it derives from sections 5—1, 5—2 and 5—3 of the Code (Ill. Rev. Stat. 1979, ch. 38, pars. 5—1, 5—2, 5—3) by applying those sections in conjunction with the murder statute. The placement of the death penalty provisions within the murder statute rather than as a separate section, combined with the introductory language of the murder statute which I have quoted, suggests that the death penalty was never meant to be imposed on a person who committed none of the acts which caused the victim's death and who can be convicted of murder only by means of accountability.

This conclusion is bolstered by the wording of the statutory sections involved. Subsection (b) of our murder statute sets forth eight aggravating factors the presence of which will permit the death penalty to be imposed. Except for the fifth factor, which involves the hiring of another to perform a murder, only one of the factors enumerated allows death for a murder in which the defendant did not personally do the killing. The sixth aggravating factor, which pertains to felony murder, is the only one which could even remotely involve a defendant who, like Ruiz, neither "perform[ed] the acts which cause[d] the death" nor was convicted on a theory of murder which requires the actual, as opposed to the imputed, intent to kill. Yet that factor is specifically limited in its application to cases where "the murdered individual was *actually killed by the defendant and not by another party to the crime* or simply as a consequence of the crime" (emphasis added) (Ill. Rev. Stat.

1979, ch. 38, par. 9—1(b)(6)(a)), regardless of the nature of the underlying felony, or even the extent of the defendant's involvement in that felony or the intensity of his intention that the victim should die. It is significant that the third aggravating factor, which pertains to murders of two or more individuals, requires that the defendant have the "*intent* to kill more than one person" or that the deaths result from "separate *premeditated* acts" (emphasis added) (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3)), neither of which conditions is met where the theory under which defendant was convicted permits his intent to be imputed. Not one aggravating factor pertains to defendants like Ruiz who do not do the actual killing and who must be prosecuted for murder under a theory such as accountability which allows the element of murderous intent to be supplied vicariously. The fact that the legislature specifically rejected or modified more inclusive forms of factors (6) and (3) in enacting the limiting provisos I have mentioned is strong evidence that it intended not to countenance so broad an application of the death penalty. See 1 H.R.J., 80th Ill. Gen. Ass'y, at 316-18 (1977) (factor (6)); 1 Legislative Synopsis & Dig., 80th Ill. Gen. Ass'y, at 955 (1977) (factor (3)).

The majority attempts to demonstrate a contrary intent by pointing to one of the mitigating factors set forth in subsection (c) of the murder statute. Its reasoning is that there would be no need to provide that absence during the commission of the acts causing death may be considered in mitigation (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(c)(5)) if accountability were not a basis for the imposition of the death penalty. This argument assumes that a defendant who is absent during the commission of the fatal acts cannot be charged with murder directly under the provision of the murder statute without resorting to accountability theories. I question the soundness of this assumption. As I have noted, one who solicits the killing of a victim does not do the actual killing; he need not be at the scene of the crime. Yet I see no reason why he cannot be prosecuted directly for murder. His intent to kill is real and need not be imputed; the act of soliciting another to perform the murder may well qualify as an "[act] which cause[s] the death" (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)). In fact, as I have also noted above, the murder statute specifically allows the death penalty to be imposed on one who solicits the murder of another. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(5).) I fail to see why the mitigating factor relied on by the ma-

jority cannot apply to such a person, or why the factor must be construed as applying to persons merely accountable for the murderous acts of others in order to have meaning.

This court should not permit a person to be sentenced to death when all that it can determine is that there is a strong possibility, or even a probability, that the death penalty statute applies to his conduct. Our practice has been to interpret criminal statutes and punishment-enhancing provisions with lenity, and to resolve each and every ambiguity in the reach of such provisions in favor of the defendant. (See, *e.g.*, *People v. Hobbs* (1981), 86 Ill. 2d 242; *People v. Haron* (1981), 85 Ill. 2d 261, 277-78; *People v. Lund* (1943), 382 Ill. 213, 215-16.) This practice should be followed with particular rigor in interpreting the death penalty statute, not only because of its severity but also because of its irrevocability. In this case the statute does not extend on its face to the grounds on which the defendant was convicted of murder, and further inquiry into the various aggravating and mitigating factors leaves room for considerable doubt as to whether the statute was ever intended to extend to those grounds. My interpretation is that such an intent did not exist. To the extent that this interpretation is disputable all doubts should be resolved in favor of the defendant. An inasmuch as the majority's attempt to make the death provision cover accountability cases depends on a labored construction of a mitigating factor which is probably not obvious to most laymen, the court should at the very least have given careful consideration to Ruiz' claim that the indictment did not sufficiently inform him that the death penalty would be sought, rather than dismissing it in two brief sentences as it did.

Traditionally, the courts of this State have adhered to the maxim that "[t]he degree of activity or participation in a crime should receive attention in fixing the sentence" (*People v. Colone* (1978), 56 Ill. App. 3d 1018, 1022; see *People v. Viser* (1975), 62 Ill. 2d 568, 586-87; *People v. Morris* (1969), 43 Ill. 2d 124, 131; *People v. Parish* (1980), 82 Ill. App. 3d 1028, 1033-34; *People v. Mikel* (1979), 73 Ill. App. 3d 21, 32). Accountable accomplices have generally been given lesser sentences than principal perpetrators in accordance with this maxim, even though both are guilty of the crime. (See, *e.g.*, *People v. Parish* (1980), 82 Ill. App. 3d 1028 (affirming disparate sentences because appellant was the principal perpetrator); *People v. Mikel* (1979),

73 Ill. App. 3d 21 (same); *People v. Colone* (1978), 56 Ill. App. 3d 1018 (reducing appellant's sentence because he was merely an accountable accomplice).) While Ruiz may not have been a "doormat" (*People v. Gleckler* (1980), 82 Ill. 2d 145, 164), neither was he a principal in the three murders for which the death penalty is being sought. I respectfully suggest that the majority should have considered this at greater length, both in exercising review of the sentence imposed in this case and in deciding whether the legislature, in enacting a capital punishment statute silent on its face regarding accountability, really intended to allow infliction of the ultimate penalty upon anyone but ultimate murderers. I would reverse the death sentence and remand for resentencing.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 28, 1983

State Appellate Defender
Supreme Court Unit
300 E. Monroe, S#200
Springfield, IL 62701

No. 53415 - People State of Illinois, appellee, vs. Luis Ruiz, appellant.

The Supreme Court today denied the Petition for Rehearing in the above entitled cause.

Very truly yours,

Juleann Hornyak

Clerk of the Supreme Court

No. 82-6466

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LUIS RUIZ,

Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's failure to raise in the court below the issues he raises here renders them beyond this Court's jurisdiction?

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TABLE OF AUTHORITIES

No. 82-6466

IN THE
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On Petition For Writ Of Certiorari To The
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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

On December 17, 1982, the Illinois Supreme Court filed an opinion affirming petitioner's convictions and sentence of death. The case is reported at 94 Ill.2d at 245.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). However, as treated more fully below, respondent submits that this Court lacks jurisdiction to entertain the questions presented by petitioner for review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. CONST. amend. XIV provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. 1979, ch. 38, par. 5-2(c) provides, in pertinent part:

5-2 When accountability exists

§5-2. When Accountability Exists. A person is legally accountable for the conduct of another when:

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a)(1) and (2) provide:

9-1 Murder-Death penalties-Exceptions-Separate hearings-Proof-Findings-Appellate procedures-Reversals

§9-1. Murder-Death penalties-Exceptions-Separate Hearings-Proof-Findings-Appellate procedures-Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another ...

Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3) provides:

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: ...

(3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts ...

STATEMENT OF FACTS

The opinion of the Illinois Supreme court, reported at 94 Ill.2d 245, fully sets forth the facts relevant to consideration of the petition and brief in opposition.

REASONS FOR DENYING THE WRIT

I.

NONE OF THE QUESTIONS PRESENTED BY PETITIONER MAY BE CONSIDERED BY THIS COURT SINCE THEY WERE NOT RAISED IN OR DECIDED BY THE ILLINOIS SUPREME COURT.

Rule 21(h) of the Rules of the Supreme Court of the United States provides, in pertinent part, as follows:

> Rule 21. The Petition for Certiorari...
>
> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion or court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

(emphasis added). Regarding the first question presented here, petitioner states (Pet. Br. 8-9) that the Illinois Supreme court held this case distinguishable from Enmund v. Florida, _____ U.S. _____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) because the evidence supports an inference that petitioner possessed the intent to kill the victims. He does not allege that he asked, or that the court below decided, the question he raises here: whether the Eighth Amendment precludes imposition of the death penalty absent an explicit finding of intent by the trier of fact. Regarding the second question, petitioner alleges (Pet. Br. at 9) that the court below held the admission of evidence of non-statutory aggravating factors proper under state law. He does not allege that the constitutionality of the statutory scheme allowing admission of non-statutory aggravating factors was put in issue in the court below. Regarding the third question, petitioner states (Pet. Br. at 9) that it "was not specifically raised on

appeal." This statement, partially correct in its present form, can be made completely and indisputably correct by the removal of the word "specifically". The relevance of the fact that Justice Simon articulated petitioner's third question in dissent is obscure in light of the fact that it was not discussed in the opinion of the court.

It is perhaps the most fundamental principle of constitutional adjudication in this Court that the questions to be decided must have been raised and properly preserved below. United States v. Ortiz, 422 U.S. 891 (1975); Tacon v. Arizona, 410 U.S. 351 (1973). Indeed, the requirement that the question to be decided must have been raised or passed upon in the highest state court to review the case is jurisdictional. Cardinale v. Louisiana, 394 U.S. 437 (1969); 28 U.S.C. §1257; Sup. Ct. R. 21(h). Since petitioner did not raise any of the questions he presents here for review in the Illinois Supreme Court, and since the Illinois Supreme Court did not consider any of those questions on its own, this Court lacks jurisdiction.

A.

The Question Regarding A Specific Finding Of Intent To Kill.

In the Illinois Supreme Court, petitioner argued that the terms of the Illinois death penalty statute (Ill. Rev. Stat. 1979, ch. 38, par. 9-1) preclude the imposition of the death penalty where the defendant is convicted, as was petitioner, under a theory of accountability [Ill. Rev. Stat. 1979, ch. 38, pars. 5-1, 5-2(c)]. People v. Ruiz, 94 Ill.2d 245, 253 (1982); Appendix A at 3, 43-62. The court below rejected this contention. Ruiz, 94 Ill.2d at 260-261. Petitioner also argued that the Eighth Amendment prohibits the death penalty for an accountability murderer, and that too was rejected. Appendix A at 3, 63-73; Ruiz, 94 Ill.2d at 262-265. Finally, petitioner argued in his petition for rehearing that this Court's decision in Enmund, supra, bars execution of an

accountability murderer, and that was also rejected. Appendix A. Petitioner never asked, and the court below never ruled on, the question he seeks to raise here: whether an explicit finding of intent to kill, as opposed to substantial evidence from which intent may be inferred, is a necessary prerequisite to a constitutionally valid death sentence. Indeed, petitioner argued below that Enmund should control this case (Appendix B), while he states here that the question presented is one "left undecided" by Enmund. (Pet. Br. at 10) Under remarkably similar circumstances, this Court, in Ortiz, supra, found that the question presented was not properly preserved. 422 U.S. at 898.

Moreover, the question of whether the sentencer is required to specifically find that the defendant intended to kill is not presented by the facts of this case, since the judge who sentenced petitioner did make such a finding. Petitioner notes, correctly, that the verdict forms signed by the jury at the guilt phase of the trial did not require them to specify whether they found him guilty on the theory that he intended to kill or do great bodily harm, or acted with knowledge that his conduct created a strong probability of death or great bodily harm. (Pet. Br. at 10-11) See, Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(a) (1), (2). He fails to note, however, that the trial judge was required to find that he acted with the intent to kill two or more individuals. Petitioner is obviously confused about the distinguishable roles of the jury at the guilt phase and the trial judge at the sentencing stage.

To prove that petitioner was eligible for the death penalty, the State relied on aggravating factor (b) (3) [Ill. Rev. Stat. 1979, ch. 38, par. 9-1(b)(3)], which provides as follows:

> (b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if: ...
>
> 3. The defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any

> law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premediated acts ...

(emphasis added). Thus, at the sentencing phase, the State put petitioner's intent in issue. The trial court, sitting without a jury [Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(d), (h)], was required to find intent to kill beyond a reasonable doubt. Ill. Rev. Stat. 1979, ch. 38, par. 9-1(f) The parties stipulated that if the witnesses called at trial were recalled at the sentencing hearing, they would give the same testimony (Ruiz, 94 Ill.2d at 267), thus the sentencing judge was called upon to take cognizance of the trial testimony in considering whether aggravating factor (b) (3) was proven beyond a reasonable doubt.

Petitioner does not challenge the sufficiency of the evidence to establish the existence of aggravating factor (b) (3). Rather, he argues that:

> [t]he trial judge who eventually sentenced Ruiz to death found the petitioner liable to (sic) the death penalty under Illinois law because of his conviction for two or more murders. (R. 627-628) The court found Ruiz liable to (sic) the death penalty without reference to the statutory language regarding an intent to kill more than one person or participation in "separate premeditated acts." Ill. Rev. Stat., 1977, ch. 38, Sec. 9-1(b) 3.

(Pet. Br. at 11) Apparently, petitioner perceives a difference of constitutional dimension between a finding that aggravating factor (b)(3) was established beyond a reasonable doubt and a finding that "... the deaths were the result of either an intent to kill more than one individual or of separate premeditated acts ..." His argument implies that if the sentencing judge had quoted paragraph (b)(3) for the record rather than simply referring to it, then the error he now alleges would vanish. It is respectfully submitted that this is nonsense.

In Ramsey v. New York, 439 U.S. 892 (1979), certiorari was dismissed as improvidently granted because this Court discovered that the question to be decided was not presented by the record. The same is true of petitioner's first question here. Respondent urges this Court to avoid having to dismiss certiorari later by denying it now.

B.

The Question Regarding Consideration Of Non-Statutory Aggravating Factors.

Petitioner's second question for review is whether Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(c) and (e), which permits the sentencer to consider non-statutory aggravating factors, is unconstitutional. In his state court brief, petitioner made no such claim. He argued simply that the trial court admitted and considered certain evidence which was not aggravating. (Appendix A at 45, 60-61) The Illinois Supreme Court's opinion holds that, as a matter of state law, the evidence was properly admitted. Ruiz, 94 Ill.2d at 267-268. The question presented here is not even remotely similar to the issue raised and ruled on below, and this Court lacks jurisdiction to consider it. Ortiz, supra; Tacon, supra; Cardinale, supra.

C.

The Question Regarding Prosecutorial Discretion To Seek The Death Penalty.

Little more need be said concerning this issue other than that petitioner himself admits that it is neither raised nor considered below. (Pet. Br. at 9) The fact that Justice Simon mentions it in disssent does not serve to retrieve it from the realm of what might have been, and the fact that it was pending before the Illinois Supreme Court in other cases is of even less significance.

CONCLUSION

The petition for a writ of certiorari makes clear that petitioner seeks to litigate in this Court a case he now wishes he had tried in the court below, a case which has never been tried. This Court's jurisdiction on certiorari does not extend so far.

WHEREFORE, for all the foregoing reasons, respondent respectfully requests that this Court deny the instant petition for a writ of certiorari.

Respectfully Submitted,

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May 13, 1983

APPENDIX A

NO. 53415

IN THE
SUPREME COURT OF
ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

LUIS RUIZ,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
Criminal Division from a Sentence of Death

No. 79 1 1986
Hon. James M. Bailey
Judge Presiding

* * * *

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

* * * *

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IN THE
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* * * *

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

* * * *

I.

NATURE OF THE CASE

This appeal concerns a triple homicide occurring

on February 25, 1979. Under an information filed jointly against this Defendant and one Juan Caballero, nine charges of murder, three charges of unlawful restraint and three charges of armed violence were brought. Each charge of murder and armed violence alleged that Ruiz had stabbed and killed the victims. However, the State produced no evidence that Ruiz had stabbed any of the deceased persons. Following a trial by jury, Ruiz was convicted on three charges each of murder, armed violence and unlawful restraint. Judgment was entered on the verdicts.

Ruiz waived trial by jury concerning the imposition of sentence. Following the hearing on aggravation and mitigation, the trial judge sentenced Ruiz to death in the electric chair.

No questions are raised on the pleadings.

II.

ISSUES PRESENTED FOR REVIEW

1. Whether a defendant found guilty of murder by virtue of accountability can be sentenced to death under the Illinois death penalty statute.

2. Whether the Illinois death penalty statute can constitutionally be applied to accountability convictions.

3. Whether the ruling by the trial court that both juries would be present if either defendant testified negated the severance and requires reversal.

4. Whether the defendant was proven guilty beyond a reasonable doubt.

III

POINTS AND AUTHORITIES

1. A DEFENDANT FOUND GUILTY OF MURDER BY VIRTUE OF ACCOUNTABILITY CANNOT BE SENTENCED TO DEATH UNDER THE ILLINOIS DEATH PENALTY STATUTE.

Ill. Rev. Stat., Ch. 38, Par. 9-1.

Ill. Rev. Stat., Ch. 38, Par. 5-2.

People v Lindsay, 412 Ill. 472, 107 N.E.2d 614 (1952).

People v Calhoun, 4 Ill. App.3d 683, 281 N.E. 2d 363 (1972).

Ill. Rev. Stat., Ch. 38, Par. 5-1.

People v Kessler, 57 Ill. 2d 493, 315 N.E.2d 29 (1974).

Ill. Rev. Stat., Ch. 38, Par. 2-4.

Ill. Rev. Stat., Ch. 38, Par. 4-4.

People v Davis, 43 Ill. App. 3d 603, 357 N.E. 2d 96 (1976).

"1977 House Journal" Vol. I, p. 316-318.

"Legislative Synopsis and Digest" 80 General Assembly 1977, Illinois, p. 955.

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People v Brownell, 79 Ill.2d 508, 404 N.E.2[illegible] (1980).

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Baldasar v Illinois, 48 LW 4481 (1980).

People v Williams, 3 Ill. App.3d 1, 279 N.E.2[illegible] 100 (1971).

People v Hill, 6 Ill. App.3d 746, 286 N.E.2d [illegible] (1974).

2. THE ILLINOIS DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IF APPLIED TO ACCOUNTABILITY CONVICTIONS.

People v Brownell, 79 Ill.2d 508, 404 N.E.2d 181 (1980).

People v Gregory, 59 Ill.2d Ill., 319 N.E.2d 483 (1974).

Ill. Rev. Stat., Ch. 38, Par. 9-1.

Lockett v Ohio, 438 U.S. 586 (1978).

Coker v Georgia, 433 U.S. 584 (1977).

Gregg v Georgia, 428 U.S. 153 (1976).

Eighth Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

Grayned v City of Rockford, 408 U.S. 104 (1972).

3. THE RULING BY THE TRIAL COURT THAT BOTH JURIES WOULD BE PRESENT IF EITHER DEFENDANT TESTIFIED NEGATED THE SEVERANCE AND REQUIRES REVERSAL.

People v Jones, 81 Ill. App.3d 724, 401 N.E.2d 1325 (1980).

Bruton v United States, 391 U.S. 123 (1968).

People v Yonder, 44 Ill.2d 376, 256 N.E.2d 321 (1969).

People v Jones, 82 Ill. App.3d 386, 402 N.E.2d 745 (1980).

People v Canaday, 49 Ill.2d 416, 275 N.E.2d 356 (1971).

People v Davis, 43 Ill. App.3d 603, 357 N.E.2d 96 (1976).

People v Graham, 48 Ill. App.3d 689, 363 N.E.2d 124 (1977).

4. THE DEFENDANT WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT.

People v Carraro, 67 Ill. App.3d 81, 384 N.E.2d 581 (1979); affirmed, 77 Ill.2d 75, 394 N.E.2d 1194 (1979).

People v Kessler, 57 Ill.2d 493, 315 N.E.2d 29 (1974).

People v Runde, 44 Ill. App.3d 598, 358 N.E.2d 710 (1976).

People v Woods, 20 Ill. App. 641, 314 N.E.2d 609 (1974).

People v Washington, 63 Ill. App.3d 1037, 380 N.E.2d 1010 (1978).

Ill. Rev. Stat., Ch. 38, Par. 10-3.

People v Satterthwaite, 72 Ill. App.3d 403, 391 N.E.2d 162 (1979).

People v Morgan, 67 Ill.2d 1, 364 N.E.2d 56 (1977), cert. denied, 434 U.S. 927 (1977).

People v Rybka, 16 Ill.2d 394, 158 N.E.2d 17 (1959).

People v Torres, 19 Ill.2d 497, 167 N.E.2d 412 (1960).

People v Washington, 26 Ill.2d 207, 186 N.E.2d 259 (1962).

People v Ivy, 68 Ill. App.3d 402, 386 N.E.2d 323 (1979).

Statutes Involved

Ill. Rev. Stat., Ch. 38, Par. 9-1:

"(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

(1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer of fireman; or

(2) the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

(3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless

of whether the deaths occurred as the result of the same act or of several related or unrealted acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

(4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

(5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

(6) the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probablity of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

(7) the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state of any investigation or prosecution of the defendant, or was an eye witness or possessed other

material evidence against the defendant.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in Subsection (b). Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant to the defendant's homicidal conduct or consented to the homocidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:

(1) before the jury that determined the defendant's guilt; or

(2) before a jury impanelled for the purpose of the proceeding if:

(A) the defendant was convicted upon a plea of guilty; or

(B) the defendant was convicted after a trial before the court sitting without

a jury; or

(C) the court for good cause shown discharges the jury that determined the defendant's guilt; or

(3) before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at teh hearing.

(f) Proof. The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure- Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude

the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure-No Jury. In a proceeding before the court alone, if the court finds that none of the factors found in Subsection (b) exists, the court shall sentence the defendants to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(i) Appellate Procedure. The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence. In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois,

the court having jurisdiction over a [illegible] previously sentenced to death shall cause the defendant to be brought before the [illegible] and the court shall sentence the defendant to a term of imprisonment under Chapter [illegible] the Unified Code of Corrections."

Ill. Rev. Stat., Ch. 38, Par. 5-1:

"A person is responsible for conduct when it is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both."

Ill. Rev. Stat., Ch. 38, Par. 5-2:

"A person is legally accountable for the conduct when:

(a) Having a mental state described in the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense is so defined that his conduct was inevitably incident

to its commission; or
(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense."

Ill. Rev. Stat., Ch. 38, Par. 2-4:

"'Conduct' means an act or a series of acts, and the accompanying mental state."

Ill. Rev. Stat., Ch. 38, Par. 4-4:

"A person intends or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct."

Ill. Rev. Stat., Ch. 38, Par. 10-3:

"(a) A person commits the offense of unlawful restraint when he knowingly without legal authority detains another.
(b) Sentence.
Unlawful restraint is a Class 4 felony."

Eighth Amendment to the Constitution of the United States

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the Constitution of the United States

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

STATEMENT OF FACTS

THE INFORMATIONS

The charges, nine counts of murder, three of armed violence and three of unlawful restraint, were filed against Luis Ruiz on April 4, 1979 (R. C. 713-728). All charges stemmed from an incident of February 25, 1979 in which two brothers, Arthur and Michael Salcido, and a third person, Frank Mussa, were stabbed to death. There were three homicide counts for each victim, charges being brought under Ill. Rev. Stat., Ch. 38, Sec. 9-1 (a-1), (a-2) and (a-3). A second defendant, Juan Caballero was also charged in all fifteen informations.

PRE-TRIAL MOTIONS

The defendant made three motions relating to the possible imposition of the death penalty. First, he filed a "Motion to Strike and Quash as Unconstitutional the Illinois Statutes Providing for the Imposition of the Death Penalty" with a supporting memorandum (R. C. 746-771). Briefly stated, he argued that the statutes were prohibited because: 1) there was no requirement for the State to notify the defendant that

the death penalty would be sought; 2) there was [illegible] for the State to notify the defendant of which aggravating factor of Ill. Rev. Stat., Ch. 38, Sec. 9-1 (b) [illegible] use to seek the death penalty; 3) the discretion to [illegible] the death penalty impermissably resided with the prosecution; and 4) the statute is vague for permitting arbitrary [illegible] tion of the penalty by a jury without adequate guidance.

Defendant also made a "Motion to Compel Prosecution to Disclose Whether it Will Request a Death Penalty Hearing if Defendant is Convicted of Murder." Defendant argued that such information was necessary for proper assistance of counsel and for proper presentation of material motions.

Finally, defendant filed a "Motion for Bill of Particulars" seeking an order compelling the prosecution to reveal which aggravating elements it would employ to seek the death penalty. The defendant argued that the bill of particulars was required by Ill. Rev. Stat., Ch. 38, Par. 114-2 (2), as particulars of the offense of which the defendant needed notice to adequately prepare his defense.

The motion to hold the death penalty statute

unconstitutional was denied. The trial judge stated:

> ". . . we have been over this motion several times in other cases before. That motion will be denied, all those arguments before the Supreme Court at the time of the State of Illinois." (Tr. 6)

The motion to compel the State to annouce prior to trial whether or not the death penalty would be sought was handled as follows:

> "THE COURT: Of course, the State's position is always, they are not going to seek it until a finding of guilty.
>
> MR. TRAINOR: In addition, Judge, it is our position we don't have to inform them at this point.
>
> THE COURT: I would answer for the State. The State is seeking the death penalty, despite what they say, okay? Because they seek it in every case. That's their position.
>
> MR. GREEN: You are saying then that --
>
> THE COURT: You will be allowed twenty challenges.
>
> MR. GREEN: Okay.
>
> MR. GURSEL: Your Honor, I would object for the Court speaking for the State.
>
> THE COURT: I am just telling you what the State's policy is in all of these cases. It is the policy of their office that Mr.

Carey has laid down, and for the State to say at this time that they don't know or not, would be to mislead the Defendant. That is what they say all the time. They don't know, but I know.

MR. GREEN: I want the record to reflect that I have a great deal of respect for your opinion. However, I don't know whether or not they plan on changing the policy in this case and I have asked them and you have asked them and they say they haven't made up their minds yet. I have to take them at their face value." (Tr. 7-8)

There is no indication of record regarding a ruling on the third motion concerning the revealing of aggravating elements.

THE TRIAL

The question of guilt or innocence was tried to a jury. Although the trials of Ruiz and Caballero were severed, they were tried at the same time before two different juries. The trial judge explained to the jurors that they would see an additional attorney and defendant, but would only hear testimony with regard to the cause they were deciding (Tr. 2). The selection of the jurors is not at issue in this appeal.

A. The State's Opening Statement

After summarizing what he believed were the events of February 25, 1979, the State's Attorney told the jury of

Ruiz:

> "Now the evidence that you are going to hear may indicate that he did not do any of the actual stabbings, doesn't make any difference. The facts, the physical evidence, the statements you will hear, the witnesses will prove conclusively that he is just as criminally liable for those three murders as that man or the other two men." (Tr. 93)

("That man" refers to Caballero and "the other two men" refers to two persons named "Laboy" and "Aviles" who were not tried (Tr. 90)).

B. The Witnesses

The State's first two witnesses, Jane Cathcart-Guzman and Nicholas Roggy, testified that the three victims had left Princeton, Illinois for the Chicago area in a 1975 Chevrolet owned by Ms. Guzman (Tr. 119-136). The next witness, Margaret Salcido, was the mother of two of the victims, aged 17 and 19 at the time of the occurrence (Tr. 136-137). Her sons and Frank Mussa arrived at her apartment in Chicago at midnight on February 24, 1979 and left an hour later (Tr. 138). The next time she saw her sons was at the funeral home (Tr. 139). Soloman Mussa, the third victim's

father, testified that his son had left Princeton the [illegible] ing of February 24 in good health (Tr. 147-149).

The State's next witness was Stephen Tepich (Tr. 151). He found the bodies in a Chevrolet parked [illegible] alley at 3:00 A.M. and called the police (Tr. 154-157).

The State then called Robert Kirschner, M.D. (Tr. 163). He performed the autopsies on all three victims (Tr. 166). Michael Salcido died of multiple stab wounds (Tr. 170), having been stabbed at least 27 times (Tr. 169-170). Frank Mussa also died of multiple stab wounds (Tr. 172) as did Arthur Salcido (Tr. 173). Dr. Kirschner stated that there was no evidence of the latter two victims attempting to defend themselves (Tr. 174). However, this did not necessarily indicate restraints (Tr. 184, 202).

The next prosecution witness was Officer Tony Jin who responded to Mr. Tepich's call at 3:00 A.M. on February 25, 1979 and found the bodies in the car (Tr. 206-219).

Officer Jin was followed by Carla Stevens, who lived in a building adjoining the alley and who found two socks in the alley on February 25; she stated that they ap-

peared to have blood on them and she gave them to a police officer (Tr. 215-219).

After former Officer Patrick Riley testified as to fingerprinting Ruiz, Officer Paul J. Roppel recounted his experiences in the early morning of February 25, 1979 (Tr. 226). He stated that when he arrived at the scene, he observed the deceased Arthur Salcido upright in the front passenger seat, the deceased Frank Musse sprawled across the front seat with his head in Arthur's lap and the deceased Michael Salcido upright in the rear seat (Tr. 229-230).

Officer Roppel arranged for the car to be towed to a police department garage (Tr. 233). The bodies were removed there and the officer observed the stab wounds (Tr. 234-235). Other than four bloodstains found to the rear of the car and outside it, there was not evidence to indicate that the stabbings took place anywhere but inside the vehicle (Tr. 241-242).

The State's following witness was also a police officer, homicide investigator Gerald Mahon (Tr. 256). He was given the socks by Ms. Stevens (Tr. 258). Both socks had

red stains (Tr. 258-259).

Officer Dennis Veneigh, of the Mobil Crime Lab, was the next witness (Tr. 264). His unit photographed the vehicle in the alley and recovered a sock in the rear yard behind 1460 West Pensacola (Tr. 267).

After the car was towed to the police garage, Officer Veneigh checked the car for fingerprints (Tr. 268). It appears that eight prints suitable for comparison were lifted (Tr. 272-274).

Officer Veneigh also was able to lift some blood from a stain found under the car after it was moved (Tr. 278-280). Blood was observed many places inside the vehicle as well (Tr. 279).

The next witness was the principal one in the case of Luis Ruiz, an 18 year old young man named Julio Lopez (Tr. 287). Lopez knew Ruiz from membership in a group called the Latin Kings (Tr. 288). Lopez joined when he was twelve and alleged he quit on May 17, 1979 (Tr. 288).

Lopez stated that at 10:00 P.M. on February 24, 1979 he saw Ruiz on the corner of Ashland and Montrose with

Juan, Poppy and Rico." (Tr. 288-289). Rico's real name is Placedo Laboy (Tr. 289). Lopez spoke with them for about five minutes, left and did not see Ruiz again that night (Tr. 290).

Lopez again saw Ruiz on the afternoon of March 2, 1979 at a mutual friend's home (Tr. 291). Laboy was also there (Tr. 291). Ruiz, Laboy and Lopez left the house for a walk (Tr. 292). The following examination then took place:

"Q What did you say?

A He said should I tell, told Placedo Laboy and Placedo Laboy just looked and then he said, 'Well, fuck him. I am going to tell him anyways.'

Q What did he say after that then?

A He said, 'Do you know who offed those three guys in that car? It was us.'

Q What did you say when he said that?

A I just looked, stood quiet.

Q Did the conversation continue?

A Yes.

Q What did he say?

A Then he says, 'I am going to tell you how we did it.' He said, 'We were in Sheffield and Clark in a restaurant and these guys came

up and asked us if we knew Jose Cortez and we told them yes and then we asked them if they were Eagles and they said no, but we just help them out.' So then he said that, 'We bumped their heads.'

Q What does 'Bump --'. When he said, 'We bumped their heads,' what did that mean?

A Con.

Q After he said they bumped their heads, what did he say?

A He says that, 'We are Eagles. We will get some reefer for you.'

Q Did he say what happened next?

A He says they got in the car. Then they tricked them to get in the alley. He pulled a gun out and held them. Juan, Placas, Laboy and Poppy, they did the stabbing while he just did the watching and checking the bodies making sure that they were dead.

Q Now, after they were all dead did he say what happened next?

A Yes, they went into a suitcase in the car and got a pair of socks out and they starting wiping off fingerprints off.

Q Did he say what they did then?

A And then they just left.

Q Now, after Louis Ruiz told you this, did you continue walking down the street with him?

A Yes.

Q Where did you go?

A Rico's house, Placedo Laboy.

Q And after you went to Placedo Laboy's house, where did you go?

A Stood there about an hour and then I went home to get dressed.

Q Did you go out again that night?

A Yes.

Q Did you, in fact, end up sleeping the night at Louis Ruiz' house?

A Yes.

Q Who was at Louis Ruiz' house when you were, when you spent the night?

A My girlfriend, his girlfriend and Ruiz.

Q Now, Saturday, at about noon were you still at Louis Ruiz' house?

A Yes.

Q What were you doing at that time?

A Sleeping.

Q What happened then?

A There was a knock on the door and they said the police and said, 'Louis Ruiz, you have got to come down with us.' Then they took a look at me and said you can come along with us too." (Tr. 293-295)

Under cross-examination, Lopez was shown a state-

ment he had signed before an Assistant State's Attorney on March 4, 1979 (Tr. 301). In the statement, he said he had quit the Latin Kings in August of 1978 (Tr. 302), he did not say that Ruiz told him the group had "conned " or "bumped" the victims (Tr. 303-305).

Most importantly, his statement to the Assistant State's Attorney said nothing about a gun; not only had he not told of Ruiz saying he held a gun on the victims, no gun was mentioned at all (Tr. 305).

He also had omitted any mention of Ruiz telling him he had kicked the bodies to make sure they were dead (Tr. 306).

Lopez then said he had told the Assistant State's Attorney of the gun and the kicking even though they were not in the written statement (Tr. 306). He followed by recanting that and saying he did not remember, but that he had told the police (Tr. 307), specifically an Investigator Flood.

Lawrence Flood was later called as a defense witness (Tr. 485). He testified that he interviewed Lopez on March 3, 1979 (Tr. 486). He stated that Lopez told him Ruiz

admitted holding a gun on the victims while they were stabbed and admitted kicking them to see if they were dead (Tr. 487). However, after being shown his written report of the interview (Tr. 488), stating that he put everything important in a report (Tr. 490) and admitting that Lopez' reference to the gun was important (Tr. 494), Flood noted that his report did not contain any mention of a gun (Tr. 494). Kicking of the bodies was also omitted (Tr. 495). In fact, neither of these representations were ever reduced to writing (Tr. 495).

It should also be noted here that although Flood was subpoenaed to the courtroom by the defendant, he instead reported to the State's Attorney's office where he reviewed his report and conversed with the prosecution (Tr. 492-493).

Returning to Lopez, he was further questioned about what Ruiz had told him:

> "Q Isn't it a fact, Mr. Lopez, that Ruiz told you that all of the stabbing and cutting that was done was done by Laboy, Caballero and Avilas?
>
> A Yes.
>
> Q Did Ruiz ever tell you he had put a hand on any of those people?

A The only thing he told me is that he checked the bodies. That is all.

Q Checking the bodies is the thing that doesn't appear in this statement, right?

A No." (Tr. 310).

Lopez further acknowledged that his statement to the Assistant State's Attorney had been transcribed by a court reporter (Tr. 312). He later said he only began to talk to the police after realizing he would go to jail if he did not (Tr. 322). He then said that the only lie he ever told in his life was when he represented to the police that he had quit the Latin Kings in August of 1978 (Tr. 323-324).

On redirect-examination, over objection, Lopez told the jury he thought he would be killed within an hour or two of leaving the courtroom (Tr. 326-327).

The next State witness was Steven Kaplan (Tr. 334), who found a folding knife in a snowbank in the alley where the bodies were discovered (Tr. 335-336). This took place on March 3, 1979 (Tr. 335). He gave the knife to the police on March 5, 1979 (Tr. 337). He might have wiped it off before doing so (Tr. 339).

The following witness was Officer Thomas Krupowicz, assigned to the fingerprint unit of the police department (Tr. 342). The only fingerprint of Ruiz was found on the outside of the rear window on the passenger side (Tr. 350, 357).

Another officer, Bernadette Kwak, testified next (Tr. 363). She had examined several pieces of evidence and was unable to determine the origin of the blood on the sock recovered at the scene (Tr. 373).

The next witness significant to this appeal was Randy Barnett, an Assistant State's Attorney (Tr. 398-399). On the evening of March 3, 1979, he was attached to the Felony Review Office in Area 6 (Tr. 401). He was called by his office at 11:45 P.M. and at 1:15 A.M. began to interview Ruiz (Tr. 401-402). He talked to him for twenty-five minutes and sometime later for another few minutes (Tr. 402-403). Mr. Barnett then rendered the following narrative of what Ruiz had told him:

> "A He told me that on the previous Sunday morning or late Saturday night, that he had been in the company of Juan Caballero, someone by the name of Popeye, someone by the name of Rico and that they had been at a disco on Irving Park Road in Chicago.

That all of four of them left the disco and tried to get into another club that was known as the Cave. They couldn't get into the club because of the price I believe and they went to get something to eat at the King Castle Restaurant that was located at Clark and Southport, which he told me was a King Castle.

As they were entering the restaurant, they saw these three victims, Michael Salcido, Arthur Salcido and Frank Mussa leaving the King Castle. Michael approached Louis and asked him if they knew where they could get some marijuana.

MR. GREEN: I beg your pardon, may I ask the court reporter read back the last sentence of the answer, please?

THE COURT: You may do so.

(Answer read as requested.)

MR. GREEN: Thank you.

BY MR. KANE:

Q Mr. Barnett, you may continue.

A Yes.

Louis told them that he didn't know. They didn't have any or he didn't know where they could get any marijuana and Michael asked him if he knew someone by the name of Jose Cortez and Louis said he did know that person, that that person was an Eagle and he asked Michael if he was an Eagle, and Michael said yes, he was an Eagle and he was a friend of Jose Cortez. And Michael went on and at some point Louis indicated to Michael that he was an Eagle also.

They were Eagles also and Michael went on to relate how he had ridden on hits of Kings with Jose Cortez and, in fact, had been the driver on one of the hits on two Latin Queens that had taken place up near Pensacola Street in Chicago.

After they had this conversation, Louis told Michael that they did know where they could get some marijuana and they would show him, or asked if they could go with him and then Michael asked his brother Arthur if it was all right. If these guys took them where they could get some marijuana and Arthur agreed and they all got into the car.

Q Mr. Barnett, did you ask the defendant, Mr. Ruiz, if in fact he was a Latin Eagle?

A Yes, I did.

Q What was his response?

A He told me he was a Latin Eagle -- I'm sorry, -- he was a Latin King.

Q Go ahead.

A They got into the car and the four Latin Kings sat in the back seat of the car and the three victims sat in the front seat of the car and they drove where the four of them directed them to drive. I believe Frank was driving the car, but I'm not sure.

Then they got to an alley somewhere in the vicinity of Cullom and Warner and when they got there, the four Kings got out of the car and told Michael to come with them and they would get him the marijuana and they went down the alley.

When they went down the alley, Louis told me that he believe that Michael had about $11 on him for the marijuana and at the time they got down the alley, they told Michael that they were Kings. They were not Eagles, and that he was a King killer and they then went and began to beat him up, all four of them beat up Michael as he was in the alley and they beat him down to the ground.

When the four finished beating him up, Rico produced a gun and Popeye took out a knife and they all four marched Michael back to the car.

Q What did he say happened when they all got back to the car?

A When they got back to the car, I believe Rico got into the driver's seat and Michael was put in the back seat and Rico then drove to another alley.

And at that time when they got into another alley, they took Frank and Michael out of the car and Juan and I believe Rico took them into the alley. It was a T-shaped alley and they took them down the T and they had him lay face down in the snow.

At that time Louis was with Popeye at the car and Popeye got into the car and he proceeded to stab Arthur, who was in the front seat of the car. Sometime between the time that Louis told me that sometime between the time they beat Michael up and the time they got there, I believe Rico stated that they would have to kill these people because they had seen their faces.

After Arthur was stabbed, then Rico brought, I believe it was not Michael but Frank,

back to the car. He pushed Frank into the front seat of the car and he, Rico, then began to stab Frank in the front seat of the car.

Juan was still with Michael over by the T in the alley in the snow. When that was over, Rico handed Louis the knife for the third person and Louis declined to take a knife.

Juan then brought the third person, who was Michael, over and then pushed Michael into the back seat and Michael was pleading at that time and he pushed Michael in the back seat. I think Louis told me Michael had seen what was going on, pushed him in the back seat and Juan began to stab the third person, Michael, in the back seat.

After the third stabbing, all four of them took some clothing that was in a suitcase in the car, there were socks and clothes, and they began to wipe down the car to eliminate fingerprints and blood.

After they had done that, all four of them left in the direction of Irving Park Road and Louis told me that he went home and went to bed." (Tr. 406-411)

On cross-examination, Mr. Barnett corrected his testimony by saying that Ruiz had not told him he went down the alley to help beat up Michael Salcido, but rather that Ruiz had remained in the car (Tr. 423-424).

As with Julio Lopez, there were significant omissions from a contemporaneously written memorandum as opposed

to trial testimony. Mr. Barnett's memorandum failed to mention that marijuana had been solicited (Tr. 425) or that Ruiz had represented himself to Michael Salcido as a Latin Eagle (Tr. 425-426).

Cross-examination also added the fact of Ruiz telling Mr. Barnett he had stayed outside the car during the stabbings (Tr. 430). Mr. Barnett repeated that Ruiz had refused the knife from his friends (Tr. 430).

On redirect examination, Mr. Barnett said Ruiz refused to speak in front of a court reporter after he had been shown pictures of the victims and had seen what had happened to them (Tr. 442).

The State rested (Tr. 446).

After a conference on exhibits, a discussion between counsel and the trial court ensued of a highly significant nature. The court inquired as to the length of the defense case (Tr. 466). Ruiz counsel responded that the answer would depend on how the judge ruled concerning whether or not both juries would be present when his client testified (Tr. 466). Counsel pointed out that the State had not asked

for both juries to hear such testimony at the time the severance was granted (Tr. 468). The court stated: "If your client does take the stand, the other jury will be present" (Tr. 468). The court also stated that if Caballero testified, the Ruiz jury would hear him (Tr. 469). Based on these determinations, Ruiz' defense counsel stated that only Investigator Flood would be offered. (Tr. 471).

Prior to Flood's testimony, defense counsel inquired of the judge if questions about the consistency of Flood's written report with what Julio Lopez stated to him orally would allow the entire report to be offered; he stated that if such were the case, he would not call Flood (Tr. 482). The court responded, "If that's all you ask him, that will be the end of it." (Tr. 482). Counsel then stated, "I want to make sure it doesn't open up the door on the rest of the report." (Tr. 482). The prosecution said it should be allowed and the court answered, "He is not going to open the door because this is strictly by way of impeachment." (Tr. 483).

Flood's direct testimony has been summarized. Briefly, it will be recalled, his written report did not con-

tain reference to Ruiz' use of a gun. In cross-examination, Flood reiterated the purported oral remarks of Lopez about the gun and kicking the bodies which were not in his report (Tr. 499). Redirect examination merely consisted of having the officer study the report, acknowldge his signature and repeat that those facts were not listed (Tr. 501-502).

The Asistant State's Attorney then said, "Why don't you read to the ladies and gentlemen of the jury the entire contents --" (Tr. 502). Defense counsel objected (Tr. 503).

> "THE COURT: Counsel, you opened the door.
>
> MR. GREEN: Judge, I asked about the questions.
>
> THE COURT: You did it twice, the objection is overruled." (Tr. 503).

Investigator Flood then read the report regarding Lopez to the jury (Tr. 503-504). It is as follows:

> "THE WITNESS: Lopez, Julio Kong, was then advised of his rights and after stating that he understood these rights, gave the following of what he knew concerning the homicide, in summary, he related that on Friday, 2 March, 1979, he was in the company of Rico LaBoy and Louis Ruiz.

At the time they were walking on Greenview toward Montrose. Louis Ruiz told Julio that he had killed three dudes in a car. He further related that he was in the King Castle located at Sheffield on Sheffield when he was approached by one of the victims who asked if they knew Jose Cortez, indicated that he wished to buy some marijuana.

During the course of that conversation one of the victims indicated that they, in the parenthesis "the victim," were affiliated with the Latin Eagles. Louis stated that he and the three individuals were Latin Eagles and parenthesis "the three victims" being Rico, Juan and Popeye, Louis, Juan Rico and Popeye then entered the vehicle with the three victims.

Louis stating that he would take them to buy some reefer. They then drove through an alley adjacent to Pensacola at which time Popeye, Juan and Rico began stabbing the victims, after which they attempted to wipe the fingerprints off the victims' auto.

Rico was present during the course of the conversation between LaBoy and Lopez. Rico made no attempt to dispute what was being said. After the conversation, Rico stated that the matter should be dropped.

The foregoing was reduced to writing by a court reporter in the presence of Assistant State's Attorney Barnett and Investigator Flood." (Tr. 403-504)

Obviously, the statement that Ruiz said "he had killed three dudes in a car" was damaging and Officer Flood was asked about it on redirect examination. He answered, "What

I read, what I read in the report, he stated that he was there or had killed the three dudes in the car." (Tr. 505-506). On recross examination, Flood said Lopez quoted Ruiz as telling him the other three did all the stabbings (Tr. 506).

In closing arguments, the prosecution acknowledged that Ruiz had not been shown to have killed anyone, but argued that he was legally responsible for those who did (Tr. 515).

After the closing argument by the defense, the State's rebuttal ensued. Several objections were made and overruled. These include a statement that Julio Lopez no longer lived in the same neighborhood and could not go back there (Tr. 550, (Tr. 552), (Tr. 554) a statement that if Lopez had ever committed a crime, the defense could have shown it (Tr. 553), a statement that "Ladies and gentlemen, I would gladly give you the police reports." (Tr.557) and a reference to Caballero giving a written statement when Ruiz did not (Tr. 558). Also objected to was a statement that Ruiz' print appeared on the door because he was holding it shut as the victims tried to climb out (Tr. 561).

Following closing arguments, instructions were

given. These included the I. P. I. instructions on aiding and abetting (Tr. 575-577). After instructions, were given, the defendant moved for a mistrial due to the prosecution's reference to the police reports in closing argument; this motion was denied (Tr. 608-609).

After deliberation, the defendant was found guilty of all charges (Tr. 609-611) (R. C. 814-822).

The State then announced it would seek the death penalty (Tr. 613). The defendant waived a jury trial on the issue (Tr. 613-614).

POST-TRIAL PROCEEDINGS

A pre-sentence investigation report was prepared (RC. 826-830). A Motion for a New Trial was filed (RC. 831-832), preserving the grounds for this appeal.

SENTENCING HEARING

The Motion for New Trial was argued and denied (Tr. 619-625). The sentencing hearing then commenced.

The defendant argued that the death penalty statute required the punishment to be imposed only on the actual killers

and could not be applied to one who was guilty for accountability (Tr. 625-627). A motion to not consider such sentence on that basis was denied (Tr. 628). The State began to call witnesses in aggravation.

The first three witnesses all testified about the shooting death of Thomas Griebell which occurred in July, 1976 (Tr. 629-655). A confession given by Ruiz at the time was read into evidence (Tr. 652-665). Ruiz did not have an attorney present when his statement was given (Tr. 652). Ruiz was 16 years old at the time (Tr. 666). The disposition of that incident was not offered.

A 1977 judgment of burglary against Ruiz was entered into evidence and the State rested (Tr. 668-669).

The defendant called Officer Lee Epplen (Tr. 669). Epplen stated that Juan Caballero's statement to him about the crime coincided with Ruiz as to who did the actual stabbing (Tr. 676-677).

Arguments ensued. The court sentenced Ruiz to death (Tr. 689-691). The Order of Sentence states that the

sentence was entered purusant to Ill. Rev. Stat., Ch. 38, Sec. 9-1 (b) (3) (R. C. 833A).

This automatic appeal follows.

V

ARGUMENT

1. A DEFENDANT FOUND GUILTY OF MURDER BY VIRTUE OF ACCOUNTABILITY CANNOT BE SENTENCED TO DEATH UNDER THE ILLINOIS DEATH PENALTY STATUTE.

Luis Ruiz did not kill anybody. That is a fact uncontroverted by the record and one which the plaintiff did not even attempt to establish. Indeed, the evidence regarding his role and extent of involvement on February 18, 1979 is so muddled and conflicting that it is the subject of a later argument regarding reasonable doubt. Suffice it to say that there was no planned murder when the victims originally agreed to accompany Ruiz and his friends and no suggestion that he had any physical contact with the deceased prior to their deaths. The only link between Ruiz and a weapon was Julio Lopez' undocumented statement at trial that Ruiz admitted holding a gun on the youths as they were stabbed. The absence of this contention in either written report, by a trained police officer and experienced State's Attorney, reduces the probative value to a nullity.

Luis Ruiz was sentenced to death under the provisions

of Ill. Rev. Stat., Ch. 38, Par. 9-1 (b) 3. The aggravating factor exposing him to the death penalty states:

> "the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts;" (emphasis supplied)

These are the only murders for which Luis Ruiz has been convicted; thus, the condition of "separate premeditated acts" is inapplicable. For Luis Ruiz to die in the electric chair, the plaintiff had to establish beyond a reasonable doubt "an intent to kill more than one person." The thrust of this argument is that the requisite intent meriting the death penalty can never exist in a conviction premised on accountability. (It should be noted here that this argument was raised at the sentencing hearing and preserved for this appeal.)

It must be stated at the outset, to avoid confusion, that for purposes of this argument, the element of intent being

considered is that present in the aggravating factor employed and not the intent necessary for conviction for murder resulting from accountability pursuant to Ill. Rev. Stat., Ch. 38, Par. 5-2. In discussing evidence of Ruiz' "intent" regarding this crime, facts relating to both accountability and the death penalty standards of intent are, of course, interrelated. Insofar as the intent required for a sentence of death however, this is a case of first impression.

The section of the death penalty statute dealing with aggravating factors is conditional and does not stand alone. It is a necessary prerequisite for issuing such sentence to find that one of the seven bases exists, but other factors in aggravation and mitigation are also weighed. Those determinations of the trial court are also considered in this argument.

It has long been held that a murder conviction on accountability will stand even absent proof that the concerned defendant actually inflicted the fatal wound, People v Lindsay, 412 Ill. 472, 107 N.E.2d 614 (1952). Lindsay was a death penalty case under the old statute which did not contain ag-

gravating factors as a condition precedent. In that action, each defendant carried a loaded revolver and in the course of a robbery, an intervening policeman was killed in a hail of bullets fired from several spots within a tavern. In sustaining the convictions and sentences, the Court stated:

> "On the night in question, all three of these men embarked upon a felonious enterprise to commit robbery. They were each armed with loaded revolvers. The compelling inference follows that they intended to use their deadly weapons to kill if necessary in the event they encountered opposition. The authorities are uniform in making all participants in the robbery equally guilty regardless of whether they fired the fatal bullets that destroyed Murphy's life." (107 N.E.2d at 622)

Thus, it is clear that if the verdicts regarding unlawful restraint and armed violence are free from a reasonable doubt attack, and Ruiz did not prove withdrawal, the murders by his companions form a basis for his conviction. But is there a basis for his execution? (It should here be noted that in Lindsay there were no aggravating factors in the death penalty statute and all defendants fired at the officer.)

For a conviction for murder, proof of specific intent is not required. Ill. Rev. Stat., Ch. 38, Sec. 9-1 (a)(1)(2)(3) contains three kinds of mental states, one of which must be established to sustain guilt, People v Calhoun, 4 Ill. App.3d 683, 281 N.E.2d 363 (1972). Ruiz was charged with all three mental states in nine counts of murder, however the felonies under which he was additionally charged are not among these listed as felony-murders. The verdict is silent as to whether Ruiz was convicted under (a-1) or (a-2). The death sentence order lists (a-1) for all three murders.

There was no proof offered that Ruiz killed any of the victims. Accountability instructions were tendered to the jury. Those instructions basically follow the wording of the Illinois accountability statute:

> "A person is legally accountable for the conduct of another when:
> (a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or
> (b) The statute defining the offense makes him so accountable; or
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission

of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense is so defined that his conduct was inevitably incident to its commission; or

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense." (Ill. Rev. Stat., Ch. 38, Par. 5-2 (1962))

Also applicable here is Ill. Rev. Stat., Ch. 38, Par. 5-1 which again served as the basis for an instruction:

"A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both."

Regarding Section 5-2, only subsection (c) is concerned here. The Plaintiff's case against Ruiz was predicated on aiding and abetting. Hence, at best, his conviction may properly be defined as proof of his intent to aid and abet

his companions and proof of his companions' intent to commit murder. The mental state ascribed to him under Ch. 38, Section 9-1 (a) is derivative. For purposes of this argument, Ruiz was shown to have the requisite mental state, an element of the offense of murder, because a person or perons for whom he was legally accountable had such mental state.

This theory of guilt has foundation in the divided opinion of this Court in People v Kessler, 57 Ill. 2d 493, 315 N.E.2d 29 (1974). There, the defendant had been found guilty of burglary and attempted murder. He had helped plan the burglary of a tavern and sat outside in the car while his companions were in the tavern. One of the companions fired at the tavern owner with a gun he found in the establishment. That gun was also used to shoot at pursuing policeman.

On appeal, the Appellate Court vacated the attempted murder convictions, stating that:

> ". . . except in felony-murder cases, the Code does not impose liability on accountability principles for all consequences and further crimes which could flow from participation in the initial criminal venture, absent a specific intent by the accomplice being held accountable

to commit, or aid and abet the commission of, such further crimes." (11 Ill. App.3d at 325-326).

This Court, however, reinstated the convictions. After reviewing the accountability statutes and Ill. Rev. Stat., Ch. 38, Par. 2-4 which defines "conduct" as ". . . an act or series of acts and the accompanying mental state," this Court held:

> "We believe the statute, as it reads, means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act." (315 N.E.2d at 32)

Clearly, this Court found the intent necessary for an attempted murder conviction to exist vicariously. Certainly, Kessler had no intent to commit murder nor did he act in furtherance of an attempted murder.

Indeed, for those reasons, Justice Goldenhersh dissented. Within that dissent, the statutory definition of "intent" is quoted:

> "A person intends or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." (Ill. Rev. Stat., Ch. 38, par. 4-4)

After noting that Kessler was not involved in shots being fired, Justice Goldenhersh stated:

> ". . . under the circumstances neither occurrence is shown to be a consequence of any action of the defendant from which the requisite specific intent could be inferred." (315 N.E.2d at 35).

The Kessler opinion leaves two inquiries for this case. First, under 9-1(a), (b-3) must the State prove beyond a reasonable doubt the actual, specific intent of the defendant to commit more than one murder for the death penalty to be imposed? Second, can that intent be imputed on the basis of accountability?

Under Kessler and its progeny, there is little doubt that proof of Ruiz' accountability will justify his conviction for murder, absent proof of his withdrawal. But will it justify his electrocution?

Evidence was offered that Ruiz helped induce the victims into their own car with Ruiz and his companions. No evidence was offered that murder was planned or contemplated at that time. Evidence was offered that Ruiz' companions brought weapons. No evidence was offered that Ruiz knew that. Evidence was offered that Ruiz' companions stabbed the victims to death. No evidence was offered that Ruiz stabbed them. Finally, the only evidenced offered at all that Ruiz participated in the murders was refuted by the absence of contemporaneous notes by the witnesses propounding it. It should be noted that even if the testimony at trial regarding the gun is deemed sufficient, accountability still stands as the basis for conviction, People v Davis, 43 Ill. App.3d 603, 357 N.E.2d 96 (1976).

In short, any intent to commit multiple murder pursuant to 9-1 (b-3) would have to be imputed. The intent of the legislature, the language of the statute and the traditional sentencing structure in this State all make it clear that even if intent can be imputed, imputed intent will not serve as a basis for an execution.

There is only one provision in the death penalty statute empowering an execution for a defendant who is not the actual killer: aggravating factor five allows death for the renumerative procurement of a killing. The remainder of the provisions, with the exception of intent in three, are silent in this regard other than aggravating factor six, felony-murder. Under this factor, when the death occurs during the course of one of the enumerated felonies, an execution is prohibited unless the defendant actually killed the murdered individual.

It would appear obvious that if accountability cannot serve as a basis for the death penalty in a felony-murder, it certainly will not where the crime leading to the death or deaths is not one enumerated by the legislature. Any doubt is disspelled by the legislative history of P.A. 80-26, the aggravating factors statute, enacted June 21, 1977.

In its consideration of H.B. 10, the Illinois House of Representatives adopted two amendments regarding felony-murder (1977 House Journal Vol. I, p. 316-318). Amendment 3

contained the following language:

> "the murdered individual was killed by a party to the crime in the course of. . ."

Amendment 4 stated that the murdered individual would have to have actually been killed by the defendant for the death penalty to apply. The enacted bill adopted Amendment 4. Execution on the basis of accountability was considered and deliberately rejected.

The inclusion of intent in aggravating factor three was also deliberate. The version of the bill sent to the Illinois Senate did not have any language to that effect. It was added by Senate Amendment 2 ten days prior to enactment of the bill (Legislative Synopsis and Digest 80 General Assembly 1977 Illinois, p. 955; Appendix II to this Brief). It would torture both legislative intent and consistent justice to disregard the clear meaning and reason for these provisions. Indeed, the defendants in Lindsay, supra, could not have been sentenced to death under the present statute.

There is no question that the jury employed account-

ability as the basis of guilt and the trial judge as the basis of sentence. When the issue was raised, the trial court's rejection was on the basis that accountability is not incompatible with the death penalty in cases other than felony-murder (Tr. 627-628). The doctrine of "inclusio unis, exclusio alterus" is, at best, a bizarre rendering of death penalty applicability.

In removing accountability as a basis for execution in felony-murder cases, the legislature recognized the brutal unfairness of imposing the ultimate consequence on a defendant for the heinous act of another person. It is illogical and untenable to assume that accountability will stand as a foundation under other aggravating factors. If two persons rob a bank and one of them kills two bank guards instead of one, will the other party to the crime be eligible for the death penalty under aggravating factor three? Of course not. How could the legislature have intended no applicability for one act over which the other defendant had no control, but intend applicability for two such acts? Such construction is a violation of the simplest

reasoning.

Not only does such a theory countermand real legislative intent, it runs contrary to the traditional sentencing scheme in Illinois. The ordinary course is defined in People v Colone, 66 Ill. App.3d 1018, 372 N.E.2d 871 (1978). There, the defendant had been convicted of armed robbery when his companions staged a home invasion after he had ascertained the victims were present. The Court affirmed guilt but reduced an 8 to 20 year sentence to the minimum. The Court stated:

> "It is true, as the State urges, that a defendant found guilty on the theory of accountability shares equal guilt with the principal perpetrators of the crime. However it does not follow that because two defendants are equally guilty of the offense that all must necessarily receive the same sentence." (372 N.E.2d at 874)

The Court went on to note that "The degree of activity or participation in a crime should receive attention in fixing the sentence." (372 N.E.2d at 874). In so doing, this Court's decision in People v Morris, 43 Ill.2d 124, 251 N.E.2d 202 (1969) was cited. There, where the defendant complained of

greater armed robbery sentences than his accomplices received, this Court said:

> "Concerning the latter contention, it is clear from the probation reports, which are included in the record, that the appellant was the dominant member of the criminal group involved and played the more active role in the commission of the crimes. He actually committed the robberies; the codefendants waited in their autos. We deem that the record justifies the imposition of a greater sentence upon the appellant." (251 N.E.2d at 206; emphasis supplied.)

Indeed, the case law of this State is rife with instances in which accomplices are routinely given lesser sentences than principal perpetrators. All of the following cases represent dispositions of murder convictions:

People v Gantner, 56 Ill. App.3d 316, 371 N.E.2d 1072 (1977): The Court affirmed disparate sentencing for the principal perpetrator as opposed to an accountable accomplice, stating:

> "The evidence at trial showed the defendant was the actual murderer. He shot Thomas at close range, without provocation and as Thomas stood in a helpless position. The accomplice, although accountable for the death by his participation in the attempt armed robbery, did

not do the actual killing." (371 N.E. 2d at 1080-1081)

People v Jones, 12 Ill. App.3d 643, 299 N.E.2d 77 (1973): The Court sustained a 75 to 100 year sentence for one defendant as compared to a 15 to 45 year term for a second defendant. The Court held:

> "Both defendants participated in a planned robbery; one of them was prepared to kill and did kill an innocent man. Under the circumstances of this case it would be inappropriate for us to substitute our judgment for that of the trial judge." (299 N.E.2d at 85)

People v Vaughn, 25 Ill. App.3d 1016, 324 N.E.2d 17 (1975): One defendant, complaining of lesser sentences for his accomplices following a murder conviction, had that contention rejected, partially on a finding "... that the evidence indicated that Vaughn had actually fired the gun." (324 N.E. 2d at 21)

People v Parish, 82 Ill. App.3d 1028, 403 N.E.2d 725 (1980): Disparate sentencing was challenged by a defendant who received a longer sentence for attempted murder than his

accomplices did for aggravated battery convictions arising from the same incident. The Court noted:

> "Moreover, the participation of the three men was not similar. Defendant shot Johnson while Bell and Latimer grappled with him." (403 N.E.2d at 729)

People v Mikel, 73 Ill. App.3d 21, 391, N.E.2d 550 (1979): Here, one defendant received a 40 to 100 year term for murder while his codefendant was sentenced to 15 to 35 years. The Court affirmed the disparity, stating:

> "Fundamental fairness requires that similarly situated defendants not receive grossly disparate sentences. However, disparity in sentencing is proper for defendants who differ in their criminal backgrounds and in their role as participation in an offense. The presentence report prepared on codefendant Seaton was not part of the record in this appeal; however, it is clear from the evidence presented at trial that defendant's participation in this offense was much more serious than Seaton's conduct. Although Seaton drove the truck on the night in question and it was his gun which was the murder weapon, defendant was the one who fired the shots which killed Anvil Nelson." (591 N.E.2d at 558)

Ruiz' participation in the crimes for which he was

convicted was beyond doubt less than that of his complanions. From opening argument to conclusion of the case, the state did not once assert that Ruiz had actually murdered any of the victims. For Ruiz to receive the ultimate penalty, the consistent fabric of this State's sentencing structure is hopelessly undermined.

Finally, as stated previously, the sentencing hearing considered other factors in aggravation and mitigation inappropriately. Principally, the trial judge considered the confession of a previous killing as an aggravating factor (Tr. 691). There is no record of a conviction for that crime. In People v Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 195 (1980), this Court attached "profound importance" to the weighing of aggravating and mitigating factors by the trial court. As such, the death penalty was remanded upon a finding that the trial court had impermissably weighed a factor in aggravation. It is a clear error in weighing a sentence to consider arrests which do not result in conviction, People v Smothers, 70 Ill. App.3d 889, 388 N.E.2d 1114 (1979). Moreover, Ruiz did not have an attorney at the time of the prior incident and in the

recent case of Baldasar v Illinois, 48 LW 4481 (1980), the Supreme Court of the United States held that even a prior conviction attained without a defense counsel cannot be used to enhance the penalty for a second offense.

The trial court also apparently disregarded the age of defendant, 19 at the time of the offense, as a factor in mitigation. Sentences are frequently reduced for youthful offenders. In People v Williams, 3 Ill. App.3d 1, 279 N.E.2d 100 (1971), the minimum term of an armed robbery conviction was reduced, partially "in light of defendant's age" which was 23 at the time of the crime. In People v Hill, 6 Ill. App.3d 746, 286 N.E.2d 764 (1972), a term for murder was reduced after the Court noted that guilt was on the basis of accountability and the defendant was 19 years old, two of the precise circumstances present here.

The brutality of this crime, the horror of the victims and the undiminished anguish of their survivors is not questioned by defendant herein. However, those facts

will not act as a substitute for a legal basis to impose the ultimate and final consequence that the death penalty represents.

The conclusion that the death penalty is inapplicable for accountability convictions is inescapable. The language of the act and the legislative history of the aggravating factors are only consistent with such a conclusion. Moreover, Illinois is uniform in its philosophy that accomplices should not be treated as harshly as principal perpetrators. Lastly, where the impermissable application of an execution was also founded on a factor entitled to no consideration, it is manifest that the death penalty be vacated.

2. THE ILLINOIS DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IF APPLIED TO ACCOUNTABILITY CONVICTIONS.

The defendant is well aware of this Court's exhaustive opinion in People v Brownell, 79 Ill.2d 508, 404 N.E.2d 181 (1980), to the effect that the Illinois death penalty statute violates neither the Eighth nor Fourteenth amendments to the Constitution of the United States. However, the sequence leading to the imposition of the sentence here demonstrates, at the least, that it was unconstitutionally applied to this defendant and, at the most, that this Court ought to reconsider its opinion in Brownell.

In Brownell, this Court rejected that defendant's argument that the indictment did not sufficiently inform him of his potential exposure to the death penalty. Noting that this was an essential requirement, People v Gregory, 59 Ill. 2d 111, 319 N.E.2d 483 (1974), this Court concluded that since Brownell was charged with murder committed during the course of two felonies enumerated in Ill. Rev. Stat., Ch. 38, Sec. 9-1 (b)(6), he was sufficiently informed of the possible consequences.

The same cannot be said here. While it is true that

Ruiz was charged with more than one murder, an aggravating factor under 9-1 (b) (3), the prosecution acknowledged at the outset that its case against him was built on the theory of accountability. Obviously, Ruiz knew both that he had done no stabbing and that the State had no evidence to that effect. Since aggravating factor six removes accountability convictions as a foundation for the death penalty, this defendant cannot reasonably be said to have knowledge that accountability can be sufficient under aggravating factor three. Indeed, defense counsel sought a ruling prior to trial as to whether execution would be sought, but the State was not directed to make such a pronouncement.

Equally important is the threshold question of whether the death penalty can ever be constitutionally applied in a case of accountability. This Court is urged to consider the following excerpt from the concurring opinion of Mr. Justice White in Lockett v Ohio, 438 U.S. 586, 624-628 (1978):

> "I nevertheless concur in the judgments of the Court reversing the imposition of the death sentences because I agree with the contention of the petitioners, ignored by the plurality, that it violates the

Amendment to impose the penalty of death without finding that the defendant possessed a purpose to cause the death of the victim.

It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate 'if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.' Coker v Georgia, 433 U.S. 584, 592 (1977) (opinion of White, J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim, the punishment of death violates both tests under the circumstances present here.

According to the factual submissions before this Court, out of 363 reported executions for homicide since 1954 for which facts are available only eight clearly involved individuals who did not personally commit the murder.[6] Moreover, at least some of these eight executions involved individuals who intended to cause the death of the victim.[7] Furthermore, the last such execution occurred in 1955. In contrast, there have been 72 executions for rape in the United States since 1954.[8]

I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposi-

tion of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See Furman v Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.

The value of capital punishment as a deterrent to those lacking in purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders-and that debate rages on-its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition of death upon those who do not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis. See id., at 310 (White J., concurring).

Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable or, indeed, any perceptible goals of punishment.

This is not to question, of course, that those who engage in serious criminal conduct which poses a substantial risk of violence, as did the present petitioners, deserve ser-

ious punishment regardless of whether or not they possess a purpose to take life. And the fact that death results, even unintentionally, from a criminal venture need not and frequently is not regarded by society as irrelevant to the appropriate degree of punishment. But society has made a judgment, which has deep roots in the history of the criminal law, see United States v United States Gypsum Co., ante, p. 422, distinguishing at least for purposes of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life.

Both of these petitioners were sentenced to death without a finding at any stage of the proceeding that they intended the death of those who were killed as a result of their criminal conduct. In Lockett v Ohio, the trial judge instructed the jury as follows:

> 'A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. . . .
> 'If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide. . . . An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances.'

On appeal, the Ohio Supreme Court held that where 'it might be reasonably expected by all the participants that the victim's life

would be endangered by the manner and means of performing the act conspired. . . participants (are) bound by all the consequences naturally and probably arising from the furtherance of the conspiracy to commit the robbery.' 49 Ohio St.,2d 48, 62, 358 N.E. 2d 1062, 1072 (1976). It is thus clear that under Ohio law a defendant may be convicted of aggravated murder with aggravating specifications and sentenced to death without a finding that he intended death to result but only that he engaged in criminal conduct which posed a substantial risk of death to others. Moreover, it appears that nowhere during either the trial or sentencing process was any finding made that Locket intended that death be inflicted in connection with the robbery. The petitioner in Bell v Ohio, post, p.637, was tried before a three-judge panel. Again, however, no findings were made either during the trial or sentencing stage of the process that Bell intended the death of the victim which resulted from the criminal conduct in which he was engaged.

Of course, the facts of both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims. But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done. See United States v United States Gypsum Co., ante, p. 422. Indeed, the type of conduct

> which Ohio would punish by death requires at most the degree of mens rea defined by the ALI Model Penal Code (1962) as recklessness; conduct undertaken with knowledge that death is likely to follow.[9] Since I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death, these sentences must be set aside.[10]"

As stated by Justice White, the plurality in Lockett did not consider this argument having already removed the death penalty on the basis that the Ohio statute impermissably prohibited the sentencing authority from considering certain mitigating circumstances. This Court is then given the opportunity to render as law in this State Justice White's persuasive argument.

The very predicates of Ruiz' conviction, e.g. that he engaged in a course of criminal design that resulted in imputed intent when his companions killed the victims, are precisely those rejected for Eigth Amendment purposes.

In the prior argument, defendant advanced the determination that the Illinois legislature never contemplated accountability as a basis for execution when the statute was

enacted. Obviously, if this Court agrees with that assessment, a ruling on this argument is unnecessary. This argument, however, if opinion on it is deemed required, has two constitutional bases.

First, of course is that execution for accountability violates the proscription against cruel and unusual punishment. In Coker v Georgia, 433 U.S. 584 (1977), the United States Supreme Court vacated a death sentence for a rape conviction, finding that such penalty was in violation of the Eighth Amendment as excessive in relation to the crime committed. Citing Grego v Georgia, 428 U.S. 153 (1976), the Court held:

> ". . . a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test in either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence - history and precedent, legis-

> lative attitudes, and the responses of juries reflected in their sentencing decisions are to be consulted. In Gregg, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes." (433 U.S. at 592)

It should here be emphasized that the plurality opinion in Coker was also written by Justice White and, when given the opportunity to apply this Eighth Amendment argument to convictions of murder where the death sentence was imposed on one other than the actual killer, he found such penalty constitutionally prohibited.

This conclusion, as noted in the previous excerpt from Lockett was derived after making the inquiries mandated by Gregg. The statistical analysis, that only eight of 363 executions were imposed on one not the actual killer, is indeed impressive. (In a footnote to the opinion, Justice White notes that two of those eight cases were in murder for hire situations.) Given the continuing reluctance of courts to impose the death penalty (this Court has vacated it in each instance considered),and the clear legislative intent, its

application to this situation is plainly violative of the Eighth Amendment.

Second, the fact that the trial court here could read the statute and determine accountability as a sufficient basis for the death penalty, renders it unconstitutionally vague and in violation of the due process clause of the Fourteenth Amendment. The court's reasoning at the sentencing hearing makes this conclusion clear. As stated in the previous argument, the trial judge read the accountability exclusion for felony-murder convictions as meaning that inclusion applied to the other aggravating factors.

As stated in Grayned v City of Rockford, 408 U.S. 104, 108-109 (1972):

> "A vague law impermissably delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Those words ring clearly when applied to this case. A law so easily subject to the ad hoc resolution of the trial judge here, on a policy so basic as the imposition of the death

penalty and on a matter so grave as the taking of a human life cannot withstand Fourteenth Amendment scrutiny.

Thus, while in the individual case of Brownell, the defendant may have been informed adequately, the statute as a whole does not accomplish that. It is fundamental for it to do so. It does not meet that requirement. It must be declared invalid.

This final conclusion is abundantly clear. If, on the one hand, this Court finds the statute easily misinterpreted, it is violative of the Fourteenth Amendment. On the other hand, if this Court finds the trial judge's ruling correct, it is violative of the Eighth Amendment. In either case, it can no longer be allowed to remain the law of this State.

3. THE RULING BY THE TRIAL COURT THAT BOTH JURIES WOULD BE PRESENT IF EITHER DEFENDANT TESTIFIED NEGATED THE SEVERANCE AND REQUIRES REVERSAL.

After the State had rested, the trial court inquired as to the anticipated length of Ruiz' defense. His counsel responded that the length was dependent upon the court's ruling on which jury would be present if either defendant testified. The court stated that both juries would hear any testimony elicited from either Ruiz or Caballero. Both men's counsel objected on the bases that a severance had been granted and that the defenses were antagonistic to one another. The court retained its initial position. The State's Attorney suggested that the opposite jury be excluded during cross-examination, but the court declined to pass on this offer (which, in any event, would not have cured the basic injustice) (Tr. 466-471).

Where the defenses of codefendants are antagonistic to each other, particularly if the testimony of one defendant will implicate the guilt of the other, a a severance is required, People v Jones, 81 Ill. App.3d 724, 401 N.E.2d 1325 (1980). In fact, having already seen statements by these

defendants implicating one another, the trial court granted a severance to avoid a conflict with Bruton v United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed2d 476 (1968). However, by exposing Ruiz' jury to statements by Caballero and visa versa, the court completely removed the affect of its original ruling.

It must be remembered that this was a bastardized severance to begin with. Both juries were present during much of the proceedings, giving Ruiz' jurors an opportunity to observe Caballero and Caballero jurors ample chance to observe Ruiz. Moreover, the two defendants were firmly linked in the minds of both juries. Accordingly, the potential impact of any testimony one provided against the other was heightened by these unusual circumstances.

It was clear from pre-trial proceedings that the defenses were dramatically opposed. Ruiz had made statements to the effect that he had withdrawn from the adventure, that he had not killed any of the victims and that Caballero had participated in the stabbings. Caballero had signed a confession (Tr. 115). Significant to this case is the absolute conclusion

that the problems created by this situation not only went to the question of guilt, but also to the potential applicability of the death penalty. And, it must be noted, at the time of the ruling complained of here, neither defendant had determined whether or not the exeuction issue would be tried to the jury.

In People v Jones, supra, the Court applied this Court's decision in People v Yonder, 44 Ill.2d 376, 256 N.E.2d 321 (1969), to facts substantially similar to the present one. There, the defendant asserted that he was not present at the scene of the crime. His codefendant's testimony would have placed him there and his counsel requested a severance on the basis that such testimony, combined with circumstantial evidence, would infer his client's guilt. Nevertheless, the severance was denied. The Appellate Court reversed and remanded the case for a new trial, holding:

> "Indeed, it was apparent that the likely testimony of Newbern would be only slightly more damaging to defendant if he were able to testify to actually having seen defendant take the money. We are unable to discern any hard and fast rule as to when severance should

> occur in a criminal case and believe that each situation should be judged on its own facts. In the instant case we believe the defenses were shown to be 'antagonistic' and the trial court should have granted a severance." (401 N.E.2d at 1329)

The situation here could not be more compelling. Ruiz maintained that he had withdrawn from the activities. A statement by Caballero, read into evidence and implicating Ruiz, could not have been anything but devastating to that defense. Such a statement also had the potential for making Ruiz unquestionally eligible for a date with the electric chair. Exposing him to such testimony was pure and chilling error. The initial request for a severance was obviously based on more than "mere apprehension" of a conflict (People v Yonder, 256 N.E.2d at 327.)

Also impermissably thwarted by this absurdly inconsistent ruling was Ruiz' right to present his defense in the manner of his choice. If he had testified, Caballero's jury would have heard him implicate his codefendant. It then would have been incumbent upon Caballero to refute this and testify himself. Ruiz' jury would have heard that testimony.

Due to the trial court's refusal to accept the State's Attorney's suggestion of exclusion during cross-examination, the likelihood existed that Ruiz' jury would have heard a statement implicating him.

It is fundamental that a severance must be granted when defenses are so antagonistic that a fair trial cannot be had without one, People v Jones, 82 Ill. App.3d 396, 402 N.E.2d 746 (1980); People v Canaday, 49 Ill.2d 416, 275 N.E.2d 356 (1971); People v Davis, 43 Ill.App.3d 603, 357 N.E.2d 96 (1976). Here, the failure to carry out the initial severance violated not only the principal of allowing defendants with antagonistic defenses separate trials, it also limited Ruiz' right to design his trial strategy in a case exposing him to the death penalty. If there are degrees of what constitutes a fair trial, the highest must be afforded a defendant in Ruiz' position.

In People v Graham, 48 Ill. App.3d 689, N.E.2d 124 (1977), the defendant's post-conviction petition was dismissed by the trial court despite an allegation that his trial

was unfair because he was led into not presenting certain witnesses in his behalf. The Appellate Court reversed the dismissal and stated:

> "The right of a defendant to offer the testimony of witnesses, in plain terms the right to present a defense, is a fundamental element of due process of law." (363 N.E.2d at 127)

Indeed, the Court noted that while Graham's complaint concerned law enforcement officials, the denial of "constitutional right would be more easily recognizable if it were achieved by the State's Attorney or the court. . ." (363 N.E.2d at 127)

This "fundamental element" of due process is no less cognizable when the witness who is discouraged by the court is the defendant himself. Thus, the compound nature of the error, to wit, the failure to provide a real severance, is not only error in itself, its effect was to chill defendant's right to testify. A trial so unfairly conducted, particularly in view of the potential consequences to the defendant, must have its result reversed so a new trial, consistent with fundamental fairness, can be held.

4. THE DEFENDANT WAS NOT PROVEN BUILTY BEYOND A REASONABLE DOUBT.

> "In order to establish guilt under the theory of accountability, the State must prove that: (1) the defendant solicited, aided, abetted, agreed or attempted to aid the other in the planning or commission of the offense: (2) this participation must hve taken place either before or during the commission of the offense; and (3) it must have been with the concurrent specific intent to promote or facilitate the commission of the offense." People v Carraro, 67 Ill. App.3d 81, 384 N.E.2d 581, 584 (1979); Affirmed, 77 Ill. 2d 75, 394 N.E.2d 1194 (1979).

As related to the opening argument in this brief, this Court divided over the issue of whether or not intent to embark on a criminal adventure extends accountability potential to all crimes committed by the group if the individual defendant neither contemplated nor participated in the further acts resulting in new crimes, People v Kessler, 57 Ill.2d 493, 315 N.E.2d 29 (1974). There is no split of authority regarding other principles of accountability. These include: Mere presence at the scene of a crime does not constitute sufficient proof of accountability, People v Runde, 44 Ill. App.3d 598, 358 N.E.2d 710 (1976); mere presence together with flight still

leaves a reasonable doubt, People v Woods, 20 Ill. App.3d 641, 314 N.E.2d 606 (1974). On the other hand, these two facts can be considered with other circumstances to support a verdict predicated on accountability, People v Washington, 63 Ill. App.3d 1037, 380 N.E.2d 1010 (1978).

The sequence of events, as testified to by the State's main witnesses, show nothing more than mere presence. According to all testimony, Ruiz and his companions first encountered the victims in a restaurant. One of the victims solicited marijuana and was initially rebuffed. The solicitation was then bolstered by an unwitting statement to Ruiz and the others that the victims had participated in attacks on the defendant's friends. In response, Ruiz offered to find marijuana if the victims would go with them in the victims' automobile. Thus far, no crime has been committed and none shown to have been intended.

Ruiz was charged with and convicted of unlawful restraint, armed violence and murder. The latter two crimes were clearly based on accountability as Ruiz was not even alleged to have used a weapon to inflict any injuries. Unlaw-

ful restraint is defined as follows:

> "A person commits the offense of unlawful restraint when he knowingly without legal authority detains another." Ill. Rev. Stat., Ch. 38, Par. 10-3(a) (1975).

Inducing people to allow you to come into their own car can hardly be said to fit this definition as it does not impair the alleged victims' locomotion or freedom to go where they please, People v Satterthwaite, 72 Ill. App.3d 483, 391 N.E. 2d 162 (1979).

The group of seven then proceeded to the first alley where the delivery of marijuana was represented as taking place. One of the victims walked down the alley with two of Ruiz' companions and was beaten. Ruiz was not charged relating to that occurrence.

At this point, testimony was given stating that a Ruiz' companion stated that the victims would have to be killed because they had seen their faces. No response by Ruiz to that remark was offered. The group then continued to the second alley, now with one of Ruiz' friends driving. The

armed violence and murders took place, according to all testimony performed by Laboy, Caballero and Aviles. The only fingerprint of Ruiz' was found outside the car. Without Ruiz participation, there are still three armed perpetrators against three unarmed victims, one of whom has already been beaten.

Where are the other circumstances necessary for accountability convictions? Yes, Ruiz was shown to be at the scene of the crimes, but where is evidence of his participation "before or during" the commission of the offense? The oral, at trial, allegations that Ruiz held a gun on the victims is void of credibility. How could a fact so critical to his involvement and potential conviction be omitted from the written reports and remain believable when advanced at trial?

Even though a defendant may be convicted for having aided and abetted a crime without performing an overt act, circumstances beyond his presence, and even his assent, are necessary to support that conviction. In affirming such verdicts, the Court has consistently found other facts than

presence and assent to sustain conviction. In People v Morgan, 67 Ill.2d 1, 364 N.E.2d 56 (1976), cert. denied, 434 U.S. 927 (1977), the general principle requiring "other circumstances" were recited and the Court stated:

> "So also we consider that defendant's continued presence here, while the victim was beaten, coupled with his sharing in the proceeds of the crime, are sufficient to show 'a common design to do an unlawful act to which all assent.'" (364 N.E.2d at 60; emphasis supplied.)

Thus, presence and assent are competent evidence, but will not stand alone. Indeed, in each of this Courts' decisions cited in Morgan, other facts creating culpability were necessarily found.

In People v Rybka, 16 Ill.2d 394, 158 N.E.2d 17 (1959), several defendants claimed that they were merely present when one of them performed an impulsive murder. While citing the general proposition that mere presence will not suffice for conviction, this Court affirmed finding that the perpetrators had all formed and discussed a plan "to get a nigger," they all searched for a victim, they all knew the murderer was armed and the murder was not performed until

scene separated defendants returned to the scene.

In People v Torres, 19 Ill.2d 497, 167 N.E.2d 412 (1960), the defendant contended that he was merely present when his companion stabbed a tavern owner to death. The Court, on the other hand, noted that the defendant returned to the tavern with the actual murderer after they had both had a fight with the victims and defendant helped force the door open when the victim tried to close it.

In People v Washington, 26 Ill.2d 207, 186 N.E.2d 259 (1962), this Court rejected the mere presence defense after finding that the defendant had chased the victim, led the way to the scene and was arrested in the victim's stolen car.

No such supporting circumstances were present here. All thoughts of Ruiz' accountability for the crimes of which he was convicted must necessarily be inferred from his presence.

In People v Morgan, supra, the Court cited with approval the language of the Appellate Court regarding the same cause. In the prior opinion, fournd at 39 Ill.App.3d 588, 350 N.E.2d 27, 34 (1976), the Court stated:

> "When one attaches himself to a group bent on illegal acts which are dangerous or homicidal in character, or which will probably or necessarily require the use of force and violence that could result in the taking of life unlawfully, he becomes accountable for any wrongdoing committed by other members of the group in furtherance of the common purpose, or as a natural and probable consequence thereof even though he did not actively participate in the overt act itself."

Therefore, in addition to proving "other circumstances," the State also has the burden of showing intent at the inception which either is dangerously homicidal or will probably require extreme force and violence. No such intent was shown. Granted, Ruiz and his companions did not lure the victims as an act of kindness, but simply no evidence of an intent, or even a probability, of the ultimate consequences was shown. Significantly, until Laboy opined that murders would have to be committed, no inference of that kind of brutality was adduced to have occurred.

In People v Ivy, 68 Ill. App.3d 402, 386 N.E.2d 323 (1979), the Court reversed an accountability conviction for attempted murder. There, the defendant approached the victim

on a train platform and, in the course of conversation, learned that the victim was confused as to his whereabouts. The defendant and his companions then went up to street level after having a discussion. The victim came up shortly and was robbed and shot by defendant's companions. Defendant and his friends were then seen running into a car driven by a woman. The police followed and captured them.

The Court held that in the absence of proof that a criminal plan had been formulated at the outset or that defendant had participated in an overt act other than the escape, guilt beyond a reasonable doubt could not be maintained.

Here, too, there is an absence of criminal plan and an absence of an overt act by Ruiz (both are necessary for conviction.) The only difference in quantum of proof between this case and Ivy is that Ruiz was present when the principal offenses occurred. However, these crimes took place in a car as opposed to the relatively open area of the Ivy situation.

Finally, it must be noted that unlawful restraint and armed violence are lesser included offenses of murder resulting in no sentence, People v McCann, 76 Ill.App.3d 184, 394 N.E.2d 1055 (1979). As the requisite proof for these offenses is not present and the murder convictions are predicated on accountability, the lack of intent or other circumstances than presence is all the more manifest. The convictions cannot stand.

VI

CONCLUSION

The death sentence, both in the ordinary course of human reason and the great and basic decency of democratic government, is addressed with the caution reserved for the most momentous decisions of our society. The finality of its impact demands that measure of attention. The uniqueness of each case dictates where that attention must be focused.

This Court is now confronted with a case in which the ultimate punishment has been imposed on a defendant to whom it was not intended to apply. If it is, indeed, the will of the people of this State to take human life, and if it is, indeed, within the provence of our jurisprudence to sanction that will, the expression of the people's intent clearly excludes convictions based on accountability and our jurisprudence will not sanction an expression to the contrary. The sentence of death must be vacated.

As unfortunate as the erroneous application of the death sentence is here, it is compounded by resulting

from an unfair trial lacking in requisite proof. The properly granted severance was obliterated by an erroneous ruling which froze the defendant from testifying. His lack of testimony doubtless enforced the incorrect inferences the jury had already drawn from his presence at the scene of the murders. Justice will not condone a finding of guilt in an unfair trial nor one based on evidence insufficient to overcome a reasonable doubt.

Wherefore, for all these reasons, defendant, Luis Ruiz, respectfully prays this Court to vacate the sentence of death. He further prays this Court to reverse his conviction or, in the alternative, remand this cause for a new trial.

Respectfully submitted,

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APPENDIX B

NO: 53415

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-Vs-

LUIS RUIZ,

Defendant-Appellant

Appeal from the Circuit Court of Cook County,
Criminal Division from a Sentence of Death

NO: 79 I 1986
Hon. James M. Bailey
Judge Presiding

* * * * * *

DEFENDANT'S PETITION FOR REHEARING

* * * * * *

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* * * * * * * * *

DEFENDANT'S PETITION FOR REHEARING

* * * * * * * * *

I.

Defendant-Appellant, Luis Ruiz, hereby petitions this Honorable Court for a rehearing of its decision of December 17, 1982, affirming the sentence of death imposed upon him. Defendant contends the following points of error in that decision:

1. This Court is the first court in the United States to hold it constitutional for a lower court to consider evidence of a crime for which defendant was never charged or convicted as a factor in aggravation.

2. This Court's imposition of the death penalty upon a person who has never been convicted or charged with inflicting a wound, fatal or otherwise, upon any other person is both prima facie unconstitutional and leads to unconstitutionally random executions.

3. This Court erred by finding that defendant was adequately informed that his conduct could lead to the death penalty, particularly when defendant deliberately declined to participate in the actual murders.

II.

INTRODUCTION

On March 16, 1983, this State stands ready to impose the first execution in this country since 1955 upon a person found guilty of murder by virtue of his accountability, Lockett -vs- Ohio, 438 U. S. 586, 621-28, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978).

In Enmund -vs- Florida, ___U.S.___, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), the Supreme Court of the United States, as acknowledged by this Court, held it impermissable for an execution to be carried out upon a party convicted of felony-murder who actions only support a conviction for the underlying felony. Even if, as this Court has held, that decision did not outlaw all executions of accountable defendants per se, its impact is such that executions of defendants such as Ruiz, while actual murderers escape the death penalty for a variety of subjective reasons, are impermissable as eligibility for death becomes vague and random.

This Court has distinguished Enmund on the basis that the participation of Ruiz in these murders was in excess to the involvement of Enmund in the Florida killings. Even assuming that the United States Supreme Court has allowed for such qualitative distinctions, this Court's summary of Ruiz' participation is erroneous, and perhaps fatally so to the defendant.

At pages four and five of its opinion, this Court points to two critical "facts" of Ruiz' involvement in these crimes. The first is that he lured the victims into the automobile, the only "conceivable purpose" of which could be to avenge the previous violence on female friends of Ruiz. The second is the beating of Michael Salcido in the first alley, before proceeding to the second alley where the killings took place.

With regard to these two foundations for the execution it must be noted with emphasis that:

a) The only witness who stated that Ruiz participated in the beating of Michael later admitted that that testimony was incorrect and Ruiz had not so participated (Tr.423-424). This Court later states that Ruiz did so participate (Opinion, P.12).

b) This Court itself acknowledged that there was no plan to kill the victims when they were lured into the car; that pronouncement by Placedo Laboy did not take place until all the parties arrived in the second alley (Opinion, P.10).

In sum, the decision of this Court to execute a man for a crime in which he committed no violence to anyone should be re-examined. Each Justice is respectfully requested to review the following arguments and decide if the proposed execution has the foundation in fact and law contended, or, rather, is the function of a subjective view that Luis Ruiz is a man not fit to live.

III.
ARGUMENT

A. THIS COURT IS THE FIRST IN THE NATION TO HOLD IT CONSTITUTIONAL FOR A MURDER TO BE CONSIDERED AS AN AGGRAVATING FACTOR WHEN THE DEFENDANT WAS NEITHER CHARGED NOR CONVICTED OF SUCH MURDER. TO DO SO IS ERROR.

Actually, admission into evidence at the sentencing hearing of Ruiz' "confession" to the murder of Thomas Griebell was not expressly stated as constitutional. Rather, this Court did not heed defendant's urging to hold it unconstitutional. Instead, this Court premised its approval of its use both on the legislature's allowance of evidence at sentencing hearings "regardless of its admissability" at a criminal trial, Il. Rev. Stat., Ch. 38, Sec. 9-1(e) (1977) (Opinion, Pg. 15) and, apparently, on the basis that the statement was given "in great detail" (Opinion, Pg. 14).

It is respectfully submitted that a grant of legislative authority may not exceed constitutional boundaries, as it does here, and that a confession, not seen fit to even serve as a basis for a prior indictment when given without benefit of counsel, is not enhanced by its great detail.

While this Court sees Sec. 9-1(e) as a broad stroke for admissability which covers a matter upon which the statute is expressly silent, the Indiana Supreme Court considered an explicit statutory grant for lower courts to weigh unconvicted murders at a death penalty hearing. The Court wrote that Gardner -vs- Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) required a defendant exposed to the death penalty must be given "a more stringent procedural standard than is required in a non-capitol sentencing situation." State -vs- McCormick, 397 N.E. 2d 276, 280 (1979). Accordingly, the Court ruled that, in giving the defendant the necessary opportunity to rebut the unconvicted murder charge, the defendant must be shown to have committed that murder beyond a reasonable doubt and "nothing short of a full trial must result." (397 N.E. 2d at 280) The Court then cogently noted that allowing an unconvicted murder as aggravating evidence allows the death penalty to be imposed upon proof lower than a reasonable doubt and would lead to capricious applicability of executions forbidden by Gregg -vs- Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed. 2d 859 (1976).

It is respectfully submitted that in supporting its position with People -vs- LaPointe, 88 Ill. 2d 482 (1981), (Opinion, Pg. 14), this Court has failed to draw the necessary distinction between the death sentence and other penalties. That case, as well as most of the cases cited therein, do not deal with the death penalty.

The wide discretion granted sentencing authorities in such cases as Williams -vs- New York, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), heavily relied on in LaPointe, is deliberately not granted with regard to the death penalty in present day United States Supreme Court determinations.

Most significantly, Gardner -vs- Florida, supra, expressly overruled Williams regarding death penalty sentencing requirements. After noting that, since Williams, a constitutional distinction had been made between the death sentence and other sentences, the Court stated:

> "... it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (430 U.S. at 358)

Moreover, the Court ruled, failure to comport sentencing with the due process clause is so onerous in relation to the death penalty, it is incapable of waiver (430 U.S. at 361).

It is also significant that the "confession" to the Griebell murder was obtained without counsel. This, no doubt, explains the failure of a charge or conviction for that offense. In Baldasar -vs- Illinois, 446 U.S. 222 (1980), the defendant was given an enhanced sentence due to a previous conviction obtained when the defendant was without counsel. The United States Supreme Court reversed this enhanced sentence, holding that a conviction obtained, even by confession, is unreliable if obtained without counsel, and stating:

> "... a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense remains invalid for increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." (446 U.S. at 228)

The allowed use of the Griebell confession clearly flies in the face of Baldasar. If a sentence for theft cannot constitutionally be enhanced by a prior, counsel-less conviction, a penalty for murder cannot be constitutionally raised to death by use of a counsel-less confession.

Nor does the "detail" of the Griebell statement provide sudden credibility to it, justifying an execution. In the very landmark decision establishing the right to counsel, the defendant's confession, disallowed by the Supreme Court, had contained more than sufficent detail to obtain his conviction, Escobedo -vs- Illinois, 378 U.S. 478 (1964).

The clear import of Escobedo, Baldasar and Miranda -vs- Arizona, 384 U.S. 436 (1966) is that confessions acquired without counsel are so inherently unreliable that they will not serve as the basis for anything. Here, this Court is allowing such a confession to stand as the foundation for a death sentence. Where the United States Suprme Court has guaranteed greater constitutional protection to such sentences, this Court has given the death penalty lesser requirements.

The mere fact that a short prison sentence could not be imposed after a convictin obtained without an attorney while the death sentence is imposed where there was not only no attorney, but no conviction, makes certain this Court's error.

The role of the Griebell confessin in the ultimate sentence is unknown. Any role is prohibited. The only way to insure it plays no such function is to reman this cause with instructions to the trial court not to consider it.

B. THE IMPOSITION OF THE DEATH PENALTY UPON A PERSON WHO HAS NEVER BEEN CONVICTED OR CHARGED WITH INFLICTING A WOUND, FATAL OR OTHERWISE, UPON ANY OTHER PERSON IS BOTH PRIMA FACIE UNCONSTITUTIONAL AND LEADS TO UNCONSTITUTIONALLY RANDOM EXECUTIONS.

As noted in the prior argument, the Griebell incident never led to an indictment or conviction. As stated in the introduction to this Petition, this Court erred when it stated Ruiz beat Michael Salcido. As acknowledged in this Court's opinion, Ruiz did not inflict any of the wounds upon the victims in this tragic occurrence.

Accordingly, a man who has, on the one hand, never have been shown to commit violence on anyone, and, on the other hand, who was demonstrably shown to have inflicted no violence in this case, is scheduled to die by the hand of the State of Illinois.

This is a bizarre execution. It is so unusual as to be blatantly capricious.

First, it is submitted that this Court misapplied the facts of this case to the holding in Enmund -vs- Florida, ___U.S.___ 73 L. Ed. 2d 1140, 102 Sup. Ct. 3368 (1982). As quoted by this Court, the United States Supreme Court, at 73 L. Ed. 2d 1151, held that the death sentence cannot be imposed on someone "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed." Since Ruiz did not himself kill nor attempt to kill, this Court's sentence is clearly founded on a conclusion that he intended killings or lethal force to be employed.

All evidence on this issue is contrary to that conclusion. While it may be true that Ruiz lured the victims to obtain vengeance, as this Court surmised, vengeance does not mean murder. Here, it definitely did not as it was not until sometime later that Placido Laboy stated the victims must be killed. Ruiz did not participate in those murders. While this Court stated that it is inconceivable that the victims died without a struggle, it is equally inconceivable that the total withdrawal of Ruiz would have made that struggle successful.

What this Court has done is excerpted a disjunctive quote from Enmund while avoiding the far more fundamental finding that the death penalty, in conformance with Gregg -vs- Georgia, 428 U.S. 183 (1976) must serve the purpose of either deterrence or retribution. When the defendant has not himself killed, the Court stated that the death penalty is not a proven deterrent to crimes from which murder sometimes results (73 L. Ed 2d at 1153) and that putting someone to death for killings he is not proven to have committed or intended "does not contribute to the retributive end" of justice. (73 L.Ed 2d at 1154).

There is nothing in this record to show that Luis Ruiz ever intended life to be taken. As stated in Enmund, citing Fisher -vs- United States, 328 U.S. 463 (1946), the death penalty is a deterrent only to acts of premeditation and deliberation. Ruiz committed no such acts.

Equally compelling is the statement in Enmunds that of the last 362 executions in this country, 339 were imposed upon the person who committed the homicidal assault. All six executions in which a non-triggerman was killed took place in 1955. (73 L Ed 2d at 1150). Luis Ruiz will thus become the first such condemned in 28 years.

This very fact ought to scream out the capriciousness of this execution. The random manner in which death sentences were imposed was the very reason for their prohibition in Furman -vs- Georgia, 408 U.S. 238 (1972). This Court itself has spared several actual killers from the electric chair for a variet of reasons; People -vs- Gleckler, 82 Il. 2d 145 (1980); People -vs- Walker, 84 Ill. 2d 512 (1981); People -vs- Hill, 78 Ill. 2d465 (1980); People -vs- Brownell, 79 Ill. 2d 508 (1979). The United States Supreme Court has cautioned that the death penalty must be based on informed judgment and governed by "objective factors to the maximum extent possible," Coker -vs- Georgia, 433 U.S. 584, 592 (1977).

The use of objective factors is clearly designed to maximize consistency. What could be more inconsistent than one execution in 28 years on a non-assaulting defendant? The only true basis upon which Luis Ruiz is being executed is a judicial perception that he is a bad person. He may be one, but that is no proper foundation for this irrevocable penalty.

C. THIS COURT ERRED BY FINDING THAT DEFENDANT WAS ADEQUATELY INFORMED THAT HIS CONDUCT COULD LEAD TO THE PENALTY, PARTICULARLY WHEN DEFENDANT DELIBERATELY DECLINED TO PARTICIPATE IN THE ACTUAL MURDERS.

The death penalty has two legitimate, judicially embraced goals; deterrence and retribution, Fisher -vs- United States, 328 U.S. 463 (1946); Enmund -vs- Florida, ____U.S.____, 73 L. Ed. 2d 1140, 102 Sup. Ct. 3368 (1982).

The true, though tragic, irony of this case, is that, by all appearances, this defendant was deterred by the possibility of the death penalty, yet will suffer its retribution.

Luis Ruiz had a simple opportunity to commit one, two or three murders. He deliberately decided not to do so. It is fundamental that his punishment should be affected by that decision.

In the dissenting opinion to this decision, it is noted that the construction put on mitigating factor (c)(5) which this Court used to apply the death penalty would be difficult for a layman to perceive in guiding his actions (Opinion, Pg. 19). Equally significant is the construction that a layman such as Ruiz would put on his actions -- if I do not kill, I am not eligible for the death penalty.

As this Court noted in its opinion, and as the United States Supreme Court stated in Woodson -vs- North Carolina, 428 U.S. 280, 304 (1976), it is the actions of the individual defendant which must be focused on. These actions must be examined in light of what his understanding of the consequences should be. It cannot fairly be said that Ruiz understood the death penalty would be a consequence of refusing to commit murder.

In Godfrey -vs- Georgia, 446 U.S. 420, 428 (1980), the Supreme Court stated:

> "... if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion'."
> (Citations omitted; emphasis supplied.)

This Court's construction of 9-1(c)(5) is a function of standardless discretion and the execution of Luis Ruiz is a product of the legislature's failure to responsibly define the crimes for which the death sentence may be imposed.

If one does not commit the actual homicidal assault, how much participation will make him eligible to die? If one deliberately refuses to kill, how much notice and definition did he have of the ultimate consequences? If the statute states that one

must be the actual killer to be sentenced to death, how does one know that (c)(5) will negate that mandate?

In short, "there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." (446 U.S. at 433). Moreover, there was no principled way for this defendant to distinguish his conduct from those clearly eligible for the death sentence.

IV
CONCLUSION

In an area of law fraught with caution and requirements for absolute definition, this Court has acted imprudently. If the Illinois death penalty statute was drafted with definition, the opinion in this case strips it of any reasonable interpretation. More importantly, it guarantees application of a haphazard and impermissable nature.

Wherefore, Defendant-Appellant, Luis Ruiz, respectfully prays this Court to grant his Petition for Rehearing and to reverse and vacate the sentence of death.

Respectfully submitted,

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No. 82-6466

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LUIS RUIZ,

Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Michael B. Weinstein, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Alexander Stevas, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served.

I further state that this mailing took place on May 13, 1983, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Michael B. Weinstein

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Assistant Attorney General
188 West Randolph Street
Suite 2200
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SUBSCRIBED and SWORN to
before me this 13th day of
May, 1983.

Gail D. Fellheimer
NOTARY PUBLIC

No. 82-6466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUIS RUIZ, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY MEMORANDUM

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IN THE

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PETITIONER'S REPLY MEMORANDUM

In its opposing brief, the State of Illinois incorrectly claims that the court below did not decide the question of whether death may be imposed in the absence of a finding of intent to kill. (Resp. Br. at 4) The Illinois Supreme Court obviously did decide this question by upholding the death sentence imposed on petitioner.

The State erroneously asserts that a finding of intent was made by the sentencing judge (Resp. Br. at 7). The record shows that the judge found only that petitioner stood convicted of more than one murder. The judge acknowledged that he did not even know the "exact language" of the pertinent statute and did not have it before him. (R. 627-628, Pet.

Br. at 6) Nowhere does the Illinois Supreme Court make any mention of a finding of intent by the sentencing judge.

The only finding of intent in this case was made, by inference, by the Illinois Supreme Court on review. This method of affirming a sentence of death violated not only the Eighth Amendment but due process as well. Presnell v. Georgia, 429 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235 (1978).

The State falsely asserts that the constitutional question of non-statutory aggravation was not raised in the court below. (Resp. Br. at 4 and 8) In fact, the constitutionality of this provision of Illinois law was specifically challenged in a reply brief filed in the Illinois Supreme Court by petitioner's appellate counsel. (App. pg. 4) The State has chosen to omit this short document from the 100 pages of state court pleadings attached to its brief.

Luis Ruiz attacked the constitutionality of the proceedings employed to obtain a sentence of death as well as the sentence itself in the highest court of Illinois. This Court should grant certiorari to review that court's refusal to grant him relief.

Respectfully submitted,

Theodore A Gottfried

THEODORE A. GOTTFRIED
State Appellate Defender

COUNSEL FOR PETITIONER

May 17, 1983

F 1

NO. 53415

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

LUIS RUIZ,

Defendant-Appellant

Appeal from the Circuit Court of Cook County,
Criminal Division from a Sentence of Death

NO. 79 I 1986
Hon. James M. Bailey
Judge Presiding

* * * * *

APPELLANT'S REPLY BRIEF

* * * * *

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IN THE
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PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

LUIS RUIZ,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
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* * * * * *

APPELLANT'S REPLY BRIEF

* * * * * *

INTRODUCTION

Defendant's initial brief raised four main issues, two concerning the death penalty, one regarding a procedural ruling relative to the severance granted this defendant from the trial of Juan Caballero and one addressed to the reason-

able doubt of defendant's guilt. The latter two issues are deemed by defendant to have been suitably submitted in the opening brief. This brief is therefore devoted solely to the efficacy of the death penalty.

While the two arguments advanced previously were submitted under the general headings of legislative intent and constitutionality, other issues mandating a reversal of the death penalty were raised within the body of those contentions.

Principal among these was that the Court had considered as a factor in aggravation a previous confession to a murder made by the defendant to a crime for which he was never convicted (D. Br. p. 60-61). As decisional law of this state and other jurisdictions makes this issue decisive to the instant matter, it is again propounded here for this Court's attention, this time as a separate argument.

I. THE COURT CONSIDERED AN IMPERMISSABLE AND UNCONSITUTIONAL FACTOR IN AGGRAVATION, PRECLUDING IMPOSITION OF THE DEATH PENALTY.

The State does not quarrel with the fact that

the Defendant's confession to the murder of Thomas Griebell was considered as a factor in aggravation at the sentencing hearing. Similarly, the State does not question that Ruiz was never convicted of that crime or that he was not represented by an attorney at the time of the confession. Indeed, the plaintiff's sole response to this argument is that no objection was made when this transcript was introduced and, according to the State, no argument based upon it can be made now (Pl. Br. p. 22).

This assertion is untrue. While defendant doubts that in any event would this Court impose the death penalty merely because a defense attorney failed to say, "I object," where the infirmity complained of is constitutional, as it is here, such objection need not be made to preserve the issue for review.

Initially, under Ill. Rev. Stat., Ch. 110A, Sec. 615(a), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Thus, in People v Graves, 23 Ill. App.3d 762, 320 N.E.2d 95 (1975), the Court allowed a con-

stitutional attack upon the statute under which the defendant was convicted though he had not raised that issue in the trial court. The Court stated:

> "The right not to be convicted of an offense charged under an 'erroneous and void statute is a 'substantial right.'" 23 Ill App.3d at 766.

Similarly the right not to be executed under an unconstitutional application of Ill. Rev. Stat., Ch. 38, Par. 9-1 is a substantial right. Since the state has argued Par. 9-1 (c) allows the sentencing authority to include aggravating factors other than those specifically enumerated, it is hereby submitted that that portion of the statute, to wit:

> "Aggravating factors may include but need not be limited to those factors set forth in Subsection (b)."

is unconstitutional if it allows consideration of a purported offense for which the defendant was never convicted.

This proposition is decisively disposed of by State v McCormick, 397 N.E.2d 276 (Sup. Ct. Ind., 1979).

There, the Supreme Court of Indiana considered the propriety of Ind. Code , Sec. 35-50-2-9 (1979), the State's death penalty statute. Specifically, the defendant challenged the constitutionality of subsection (b) (8), an aggravating factor which stated:

> "The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder."

The defendant attacked both the constitutionality of the statute on its face and as applied to his case.

The Supreme Court agreed that the statute was unconstitutional as applied to the defendant. Indiana, like Illinois, requires proof of death sentence applicability beyond a reasonable doubt. The Court then held that to use the other murder as an aggravating factor would require its proof beyond a reasonable doubt. Since a conviction had not been obtained, and reasonable doubt decided in that manner, the defendant, in essence, would be tried for this unconvicted murder during his sentencing hearing.

The sentencing authority trying that issue, the Court noted, "would be undeniably prejudiced" by the conviction before it of an unrelated murder. (397 N.E.2d at 280). In short, the Court stated:

> ". . . because of the prejudice inherent in the sentencing procedure where the State alleges that the defendant committed another murder, "regardless of whether he has been convicted of that other murder," and that other murder is not related to the principal charge, we hold that Sec. 35-50-2-9 (b) (8) denies due process as applied to this defendant. U.S. Const. Amend. XIV." (397 N.E.2d at 281).

Luis Ruiz has not been found guilty of the murder of Thomas Griebell beyond a reasonable doubt. Its application as an aggravating factor here is plain, unconstitutional error.

As stated in the defendant's initial brief, the misuse of aggravating factors has already been held dispositive by this Court, People v Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980). Indeed, regarding the plaintiff's contention that this argument was waived by the failure to object in the trial court, attention is directed to

the fact that in Brownell, the defendant never raised the argument upon which his sentence was reversed (79 Ill. 2d at 525).

It is impossible for this Court to read the mind of the trial judge to determine what part the Griebell incident played in the decision to sentence this defendant to death. Suffice it to say that the State presented this fact at length and emphasized it for effect. It was unconstitutional for it to have done so and the sentence of death must be vacated.

II. A DEFENDANT FOUND GUILTY OF MURDER BY VIRTUE OF ACCOUNTABILITY CANNOT BE SENTENCED TO DEATH UNDER THE ILLINOIS DEATH PENALTY STATUTE.

To the extent this Court deems it appropriate, the defendant apologizes for what plaintiff calls the two "disjointed" arguments posed in the initial brief. The concepts of the death penalty, intent and accountability of all, has long been subject to confusing and sophisticated legal debate. While defendant believes his cause has been presented in a forthright and coherent manner, the very na-

ture of this cause does not lend itself to simple Kantian logic; for, as stated by Justice Blackmun in a recent oral argument on this issue - - death is different.

The Supreme Court of the United States made that fundamental precept quite clear in Gardner v Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S. Ct. 1197 (1977). There, the Court sought to distinguish the case before it from Williams v New York, 337 U.S. 241 (1949). In so doing, the Court noted:

> "In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was found guilty of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.
>
> First, five members of this Court have now expressly recognized that death is a

> kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (97 Sup. Ct. at 1204; citations omitted).

The very debate which rages within the confines of this case ought chrystallize, in terms of the reasoning above, the inappropriateness of the death penalty here.

The defendant's argument is really rather simple: the intent requisite for proof of guilt for accountability differs from the intent necessary for exposure to the death penalty. The difference is made clear both by the legislature enactment of the death penalty and decisional law on sentencing for accountability.

The State counters by saying that an accountable defendant is equally guilty of the principal crime and that the accountability exclusion for felony-murder necessarily means its inclusion under other aggravating factors. Both arguments are fallacious and ignore the dictate that "death is a different kind of punishment from any other which may be imposed in this country."

While the initial brief is filled with cases revealing that accountable defendants traditionally are sentenced more leniently than principal offenders, the State contends that since they are eligible for the same punishment, this defendant may be sentenced to death. But death is different. Equal guilt does not mean equal punishment. When this has historically been true of lesser offenses, it certainly must be true of capital crimes.

Simply stated, the level of intent differs. Under Ch. 38, Par. 9-1 (f), the State must prove eligibility for the death penalty beyond a reasonable doubt. Under aggravating factor b (3) the State must show, beyond a reasonable doubt, this defendant's intent to kill more than one

person. By the very fact that the State concedes Ruiz did not kill anybody, it fails in its burden.

Any argument that accountability intent, principal crime intent and death penalty intent differ is dispelled by the decision of the Supreme Court of Michigan in People v Aaron, 299 N.W.2d 304 (Sup. Ct. Mich. 1980). In that case, following a fascinating historical study of the felony-murder doctrine, the Court abolished the doctrine in that State.

Quoting from Gegan, "Criminal Homicide in the Revised New York Penal Law." 12 N.Y.L. Forum, 565, 586 (1966), the Court stated:

> "'If one had to choose the most basic principle of the criminal law in general . . . it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. . .'" (299 N.W.2d at 316).

The Court went on to hold:

> "The most fundamental characteristic of the felony-murder rule violates this

> basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons. The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct." (299 N.W.2d at 317; emphasis supplied.)

The doctrine of accountability and its relation to punishment is precisely the same as applied to this defendant as to one found guilty of felony murder. Indeed, the Michigan Supreme Court found it particularly abhorrent in capital cases stating that while other murders required a showing of premeditation, deliberateness and willfulness for imposition of the death penalty, "felony-murder only requires a showing of intent to do the underlying felony." (299 N.W.2d at 317).

It is simply illogical to presume that the legislature removed accountability from death penalty consideration for felony-murder and yet deemed it applicable to other aggravating factors. The intent to commit three murders and

"the intent to promote or facilitate such commission" (Ill. Rev. Stat., Ch. 38, Par. 5-2(c)) are different. Indeed, if the legislature desired, it could have used the words "intent to commit."

The death penalty simply cannot be imposed based upon a concept that "ignores the concept of determination of guilt on the basis of individual misconduct." Neither the legislature, nor the common law of this state ever intended it to be so imposed. The evidence was unrefuted that this defendant refused to participate in the stabbing. His intent and his individual misconduct differed from that of the principal perpetrators.

The plaintiff attempts to invoke mitigating factor (5): "the defendant was not personally present during commission of the act or acts causing death" as a basis for holdthat the legislature intended accountability to apply to the death penalty. However, as hiring one to commit murder makes one eligible for the death penalty, it is this crime which is addressed by this mitigating factor as well as situations where explosive devices are used.

Inspite of the defendant's statement in the initial brief that trial court's "inclusio unis, exclusio alteris" interpretation was a bizarre way to apply the death penalty, the State has again relied on that theory here. As first stated in Furman v Georgia, 408 U.S. 238 (1972), and reiterated in Gregg v Georgia, 428 U.S. 153, 188 (1976), the uniqueness of the death penalty forbids its imposition "under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg further noted that a suitable statute be drafted to ensure "that the sentencing authority is given adequate information and guidance." (428 U.S. at 195). It is simply the defendant's position that adequate sentencing guidance cannot be found for imposition of death where the statute eliminates accountability for felony-murder, includes it for murder for hire and is silent on the other factors. If a presumption must be made as to what the legislature intended, that presumption must be made against death.

III. THE ILLINOIS DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IF APPLIED TO ACCOUNTABILITY CONVICTIONS.

The State's response to this argument is very brief and evasive. It contends that Ill. Rev. Stat., Ch. 38, Par. 9-1 (1979) has been upheld by this Court, a proposition not denied by defendant and that the quote from Lockett v Ohio, 438 U.S. 586 (1979) is from a concurring opinion and not persuasive.

Additionally, and misleadingly, the plaintiff has implicitly stated that Lockett upholds the concept of death penalty imposition for accountability because the Court held the indictment adequately informed of him of his eligibility under the Ohio statute. However, informing the defendant of legislative intent is far from holding that such intent is constitutional.

In fact, Justice Burger, writing for the plurality found one of the statute's infirmities to be that it did not allow lack of intent to commit murder to be an independent, mitigating factor. Moreover, in a second concurring

opinion, Justice Blackman stated:

> ". . . the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her mens rea, in the commission of the homicide." (438 U.S. at 613)

Justice Blackman went on to note that accountability eligibility of the death sentence would most likely lead to the Eighth and Fourteenth Amendment violations found in Furman v Georgia, 408 U.S. 238 (1972). Thus, the various opinions of Supreme Court Justices in Lockett are indeed persuasive. It is, in fact, inconceivable that the Supreme Court of the United States will allow accountability convictions to lead to the electric chair.

The State's response to the argument that accountability application renders the statute vague merely reveals its failure to consider the difference in intent between aiding and abetting and being a principal, the fact that "intent" is made a factor in Par. 9-1 (b) (3) and the con-

cept that the death penalty differs from other punishment. This latter factor includes a close judicial scrutiny of the statute under which the penalty might be invoked.

In Woodson v North Carolina, 428 U.S. 280 (1976), the Supreme Court held that a death penalty statute must allow consideration of the "circumstances of the particular offense" as a "constitutionally indispensable" factor (428 U.S. at 304). In Lockett v Ohio, 438 U.S. 586 (1979), the Court repeated its oft noted dictate that death sentence discretion must be wide in considering mitigating factors. Indeed, after stating that states are free to impose equal guilt on accomplices, the Court stated:

> "But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." (438 U.S. at 602).

The State evidently disagrees with that statement. It would have this Court hold that accountability, having been defined by this State as amounting to equal guilt, "automatically" dictates that death is the proper penalty.

As stated in the previous argument, this submits applicability of the death sentence to a presumption. The statute has eliminated accountability for one factor and embraced it for another. The plaintiff now wants this Court to presume that it automatically applies to the factors which are silent in that regard. Going even further, the plaintiff does not even see it to be considered as a factor in mitigation.

A death penalty statute subject to the State's construction here is unconstitutional on its face, at worst, and unconstitutionally vague at best. Death penalty statutes are required to be definitive. This statute is not in the area of accountability. It cannot stand as a basis for this defendant's execution.

CONCLUSION

Wherefore, for all these reasons, defendant, Luis Ruiz, respectfully prays this Court to vacate the sentence of death. He further prays this Court to reverse his conviction, or, in the alternative, remand this cause for a new trial.

Respectfully submitted,

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May 23, 1983

Honorable Alexander L. Stevas
Clerk of the United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

Re: Ruiz v. Illinois, No. 82-6466

Dear Mr. Stevas:

Petitioner's assertion that respondent has made false representations to the Court regarding the record impels this correspondence.

At page 2 of his reply memorandum, petitioner states that the constitutionality of Ill. Rev. Stat. 1979, ch. 38, pars. 9-1(c) and (e), which permits the sentencing authority to consider evidence of non-statutory aggravating factors in deciding whether the death penalty should be imposed, was specifically challenged in a reply brief before the Illinois Supreme Court. He labels as a false assertion respondent's statement that no such claim was raised below.

The matter is disposed of, and respondent's position vindicated, by reference to Illinois Supreme Court Rule 341(e)(7) [Ill. Rev. Stat. 1979, ch. 110A, par. 341(e)(7)], which provides, in pertinent part:

> Points not argued [in the brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

This rule is specifically made applicable to criminal cases by Supreme Court Rule 612(i), [Ill. Rev. Stat. 1979, ch. 110A, par. 612(i)].

While I would not for a moment question the State Appellate Defender's duty to zealously represent criminal defendants, I submit that this duty can be fully discharged without wrongly attributing to opposing counsel a purpose to deceive the Court as to the true state of the record.

I would appreciate your bringing this letter to the attention of the Justices when this case is presented to them for disposition.

Respectfully,

Michael B. Weinstein

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cc: Theodore Gottfried

MBW/nr